APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. 370

ELLIOTT GOLDEN, as Acting District Attorney of the County of Kings,

Appellant,

—v.—

SANFORD ZWICKLER,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

FILED AUGUST 2, 1968

PROBABLE JURISDICTION NOTED OCTOBER 14, 1968

INDEX

Docket Entries.

Date	Filings—Proceedings
4-22-66	Complaint Filed. Summons Issued.
4-22-66	Motion for temporary injunction and convening of three-judge court. (returnable May 18, 1966)
4-26-66	Summons returned and filed. Defendant served on 4/22/66.
5- 3-66	Amended Complaint Filed.
5- 3-66	Notice of motion for temporary injunction and convening of three Judge Court etc. (ret May 18, 1966)
5- 4-66	Notice of motion filed for an order dismissing the amended complaint herein pursuant to Rule 12b (1)(6) of the Federal Rules of Civil Procedure on the grounds that (a) this Court lacks jurisdiction of the subject matter of said amended complaint, etc. (returnable May 18, 1966)
5-18-66	Before Rosling, J.—Hearing on motion granting a preliminary injunction in favor of Pltff—Motion argued—Decision reserved.
5-18-66	Before Rosling, J.—Hearing on motion dismissing the amended complaint pursuant to Rule 12b (1)(6)—Motion argued—Decision reserved.
5-20-66	By Rosling, J.—Decision rendered on Pltff's motion for three judge court is granted, motion insofar as it seeks temporary injunction and deft's cross motion to dismiss will be referred to such court for hearing etc. Settle order on notice (See opinion)
5-25-66	By Lumbard, Ch. J. Court of Appeals.—Order filed designating Hon. Joseph C. Zavatt, Ch. J.—D. C., Hon George Rosling, D. C. Hon Irving R.

Docket Entries.

DATE	FILINGS—PROCEEDINGS
	Kaufman, C. J. as three judge Court in above action.
5-25-66	By ROSLING, J.—Order (signed 5/24/66) filed, that a three-judge court consisting of Circuit Court Judge Irving R. Kaufman, Chief Judge, D. C. Joseph C. Zavatt and D. C. Judge George Rosling will convene for hearing on 6/9/66 etc. All additional papers and briefs, i.e. other than those already submitted, shall be filed in guadruplicate with the Clerk, not later than 6/6/66. (P/C mailed)
5-31-66	By ROSLING, J.—Order filed that motion of Pltff for an order to convene a three-judge court is granted and the motion of the Pltff for a temporary injunction and the motion of deft for dismissal of the amended complaint are hereby referred to said three-judge court for hearing and determining said cause. (P/C mailed to attys)
6- 9-66	Before KAUFMAN, C. J., ZAVATT, CH. J., ROSLING, J., Hearing on motion of Pltff for a temporary injunction and the motion of deft for dismissal of the amended complaint etc. Hearing held and concluded—Decision reserved.
9-19-66	By KAUFMAN C. J.—ZAVATT CH. J. & ROSLING, J.—Decision rendered on motion by Pltff for preliminary injunction and deft's motion to dismiss—Concurring opinions by Kaufman C. J. and Zavatt, Ch. J., denying Pltff's motion for preliminary injunction and granting deft's motion to dismiss (Settle order on or before 10 days from date) By ROSLING, dissenting opinion (See opinion filed)

Docket Entries.

Date	Filings—Proceedings
9-29-66	By Kaufman, C. J., Zavatt, Ch. J.—Order filed that the motion of Pltff for a preliminary injunction is Denied and that the motion of deft to dismiss complaint is granted. (P/C mailed to attys)
10-12-66	By Kaufman, C. J.,—Revised concurring opinion filed.
10-14-66	By Rosling, J.—Revised dissenting opinion filed.
10-28-66	Notice of Appeal Filed. (affid of service by mail of a copy of appeal, to Louis J. Lefkowitz, Atty General, 80 Centre St, N. Y. annexed to appeal)
11-22-66	Transcript of June 9, 1966—hearing filed.
2-17-67	Certified copy of Order of Supreme Court filed, probable jurisdiction noted and the case is placed on the summary calendar.
12- 8-67	Opinion of Supreme Court filed.
1- 4-68	Certified copy of order Supreme Court that the judgment of said court is reversed with costs; and that this cause is, remanded to U.S.D.C. for E.D.N.Y. for further proceedings in conformity with the opinion of Supreme Court. It is further ordered that, Sanford Zwickler recover from Aaron E. Koota, $433.67 for his costs. (J/C)
1-20-68	Copy of record on appeal filed.
1-20-68	Affidavit of Brenda Soloff filed.
1-25-68	Pltff's supplemental brief filed.
2-13-68	Deft's supplemental brief filed.
2-13-68	Appendix for deft filed.

Docket Entries.

DATE	FILINGS—PROCEEDINGS
2-19-68	Reply brief of Pltff to supplemental brief of deft filed.
3-27-68	Pltff's second supplemental brief filed.
3-30-68	Second supplemental brief for deft filed.
4- 3-68	Pltff's reply to second supplemental brief for deft filed.
5- 6-68	By Judges Kaufman, Zavatt, & Rosling, Decision rendered on atty Gen'l application for leave to file a supplemental affidavit—Application denied—Settle order on 10 days' notice returnable on or before May 24, 1968. (See opinion)
5-21-68	By Rosling J—Memorandum to clerk filed advising that footnote 7 of opinion filed May 6, 1968 has been revised with the concurrence of Judges Kaufman and Zavatt. Revised pages 34 and 35 bearing legend "Revised 5/20/58" have been substituted for original pages 34 and 35. Copies of revised pages sent to persons who received the original opinion.
6-18-68	By Judges Kaufman, Zavatt, & Rosling,—Order filed denying deft's motion to dismiss and enjoining deft Koota from arresting or prosecuting pltff. under said statute, also denying deft's application to file supplemental affidavit etc. That pltff recover of deft the sum of $44.36 costs as taxed. This order & Judgment are hereby stayed to and Including July 8, 1968 etc. (P/C mailed to attys)
7- 3-68	Notice of Appeal Filed. (Copy of appeal mailed to Emanuel Redfield, Esq. 37 Wall St. N. Y.)

Docket Entries.

DATE	FILINGS—PROCEEDINGS
7- 9-68	Record on appel certified and mailed to U. S. Supreme Court Washington, D. C.
7-12-68	Receipt returned from U. S. Supreme Court, Washington, D. C. Acknowledging record on appeal.
7-13-68	Certified copy of order of Supreme Court filed that the judgment of the district Court is stayed providing the appellant perfects and dockets his appeal in this Court on or before Aug 5, 1968. Should such appeal be so perfected and docketed by that date this stay is to remain in effect pending the issuance of the judgment of this Court. (memorandum of Mr. Justice Harlan annexed)
8- 7-68	Certification filed, noting that an appeal from U.S.D.C.—E.D.N.Y. was filed in Supreme Court on 8/2/68 etc.
10-21-68	Certified copy of Supreme Court order filed. The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

Summons.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action File No. 66C 375

SANFORD ZWICKLER, *Plaintiff*,

—against—

AARON E. KOOTA, as District Attorney of the County of Kings, Defendant.

SUMMONS RETURNED AND FILED—April 26, 1966

To the above named Defendant:

You are hereby summoned and required to s ve upon Emanuel Redfield, plaintiff's attorney, whose address is 60 Wall Street, New York 5, New York, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Lewis Orgel, Clerk of the Court, By James R. Abram, Deputy Clerk.

Date: April 22, 1966.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[File endorsement omitted]

Amended Complaint.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66-C-375

[Title omitted]

AMENDED COMPLAINT—Filed May 3, 1966

The plaintiff, by his attorney, Emanuel Redfield, for his Amended Complaint, respectfully alleges:

First: The action arises under 28 U.S.C.A. Section 1343(4) and 28 U.S.C.A. Section 2201, as hereinafter more fully appears.

Second: The plaintiff at all times hereinafter mentioned was and still is a resident of the Borough of Brooklyn, City and State of New York.

Third: That at all times hereinafter mentioned, the plaintiff was and still is a citizen of the State of New York and of the United States of America.

Fourth: The defendant Aaron E. Koota at all times hereinafter mentioned, was and still is the District Attorney of the County of Kings, State of New York.

Fifth: On or about October 29, 1964, a prosecution was commenced against the plaintiff herein by the defendant herein in which plaintiff was charged with having violated Section 781-b of the Penal Law of New York, in that on that day the plaintiff distributed in the Borough of Brooklyn, City of New York, a quantity of a leaflet, a copy of which is hereto annexed as Exhibit I, without containing the name and address of the printer or sponsor of said leaflet.

[File endorsement omitted]

Sixth: The said leaflet referred to the Democratic candidate for the Congress of the United States at an election to be held on November 3, 1964, or about four days after the date of the said distribution.

Seventh: At a trial held on December 11, 1964 in the Criminal Court of the City of New York, County of Kings, the defendant herein produced witnesses on behalf of the People of the State of New York and moved the court for judgment on behalf of the People of the State of New York.

Eighth: At the same trial the plaintiff herein moved for a dismissal of the charge on the ground that the aforesaid statute upon which the prosecution was premised, is unconstitutional in that it violated the Fourteenth Amendment to the Constitution of the United States.

Ninth: The said court overruled the contentions of plaintiff and on February 10, 1965 found plaintiff guilty of having violated said staute.

Tenth: Thereafter the plaintiff perfected an appeal to the Appellate Term of the Supreme Court of the State of New York for the Second Judicial Department.

Eleventh: The said Appellate Term by order dated and entered the 23rd day of April, 1965 reversed the said conviction solely on the ground that there was no adequate proof that the plaintiff had distributed the leaflet "in quantity."

Twelfth: On June 25, 1965 permission was granted to the People of the State of New York to appeal to the Court of Appeals, and the People thereafter perfected such appeal.

Thirteenth: On December 1, 1965 the Court of Appeals unanimously and without opinion or memorandum affirmed the order of the Appellate Term.

Fourteenth: The plaintiff desires and intends to distribute in the Borough of Brooklyn, County of Kings, New York, at the place where he had previously done so and at various places in said County, the anonymous leaflet herein described as Exhibit I and similar anonymous leaflets, all prepared by and at the instance of a person other than the plaintiff. The said distribution is intended to be made at any time during the election campaign of 1966 and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966. Such distribution is intended to be made in quanties of more than a thousand copies of such anonymous leaflet.

Fifteenth: Upon information and belief, the person referred to in said leaflet is the present incumbent and will become a candidate in 1966 for reelection to the Congress of the United States and has been a political figure and public official for many years last past.

Sixteenth: Plaintiff intends to distribute said leaflet and similar leaflets anonymously because of his belief and claim that the statute in forbidding the distribution of anonymous literature of the nature described is unconstitutional in violation of the First and Fourteenth Amendments to the Constitution of the United States, in that it is an infringement of the freedom of expression, and that until the statutes is declared constitutional, plaintiff will persist in his claim of the right to make such distribution.

Seventeenth: The said leaflet is embraced within the scope and intendment of the statute.

Eighteenth: The defendant, Aaron E. Koota, previously prosecuted plaintiff and is a diligent and conscientious public officer and pursuant to his duties intends or

will again prosecute the plaintiff for his acts of distribution as aforesaid.

Nineteenth: Because of the previous prosecution of plaintiff for making the distribution of the leaflet, as aforesaid, and because of the threat of prosecution of him, plaintiff is in fear of exercising his right to make distribution as aforesaid and is in danger of again being prosecuted therefor, unless his right of expression is declared by this court, without submitting himself to the penalties of the statute.

Wherefore, plaintiff demands judgment:

1. Declaring that Section 781-b of the Penal Law of New York is unconstitutional in that it infringes upon the rights of the plaintiff under the First and Fourteenth Amendments to the Constitution of the United Sates;

2. Enjoining the defendants, his agents and assistants from prosecuting the plaintiff because of the matters alleged in this complaint;

3. Granting the plaintiff an injunction pending the determination of this action;

4. Directing that this action annd all proceedings thereunder be heard before a three-judge court pursuant to Section 2281 U.S.C.A.

5. Such other and further relief as to the court may seem just.

Emanuel Redfield, Attorney for Plaintiff, Office & P. O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

Exhibit I to Amended Complaint.

REPRESENTATIVE MULTER— EXPLAIN YOUR POSITIONS

AID TO NASSER

On September 2, 1964, an amendment was proposed to a foreign aid bill (Public Law 480). In substance, it would have cut off all aid to the United Arab Republic. Congressman Multer spoke at length against the amendment, and in his own words, urged its defeat "as earnestly as I can". He stated that his position was based on "humanitarian instinct". (Congressional Record 20792).

In this respect, the following should be noted

(a) Congressman Multer's stand permits the diversion of funds by Dictator Nasser to his armaments buildup.

(b) The United Arab Republic is also a recipient of aid from Communist Russia.

(c) Egypt is now employing the technical skills of scientists, formerly under the employ of the Nazis.

(d) Congressman Multer debated against the amendment on the eve of the summit conference held in Cairo by 13 Arab States which are threatening the peace of the Near East and the State of Israel in particular.

SOVIET ANTI-SEMITISM

The 1964 Foreign Aid bill was passed in the United States Senate with an amendment sponsored by Senator Abraham Ribicoff (D., Conn.) that strongly condemned the anti-Semitic practices of the Soviet Union. When this

issue was brought to the House-Senate conferees, a much more general statement decrying all types of religious bigotry was adopted.

Representative Multer praised this "watered down" measure on the House floor, and stated:

> "While the Senate version did point the finger directly at Soviet Russia, the version as finally adopted, I think, is much the better one."
>
> "I believe, instead of pointing the finger at the culprit now before the bar of world public opinion where it is being so severly condemned, it is much better that this Congress go on record as it is doing now, against religious persecution wherever it may raise its ugly head." (Congressional Record 22850).

W H Y MR. MULTER, W H Y ? ? ? ? ?

Duly sworn to by Sanford Zwickler, jurat omitted in prnting.

Affidavit of Service by Mail (omitted in printing).

Plaintiff's Notice of and Motion for Temporary Injunction and to Convene Three-Judge Court—Filed May 3, 1966.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66-C-375

[Title omitted]

PLAINTIFF'S NOTICE OF AND MOTION FOR TEMPORARY INJUNCTION AND TO CONVENE THREE-JUDGE COURT—Filed May 3, 1966

SIRS:

Please Take Notice that the undersigned pursuant to Rule 65 of the Rules of Civil Procedure, will move this court at a Motion Term in the Federal Building, Washington and Johnson Streets, Brooklyn, New York, on the 18th day of May, 1966 at 10:00 A.M. or as soon thereafter as counsel can be heard.

1. For an order granting a preliminary injunction, in favor of plaintiff, enjoining the defendant from in anywise interfering with the distribution of the anonymous leaflet set forth in the amended complaint or similar ones;

The grounds of this motion are fully set forth in the amended complaint and are that:

(a) The statute under which the defendant is authorized to act, to wit, Section 781-b of the Penal Law of the State of New York is unconstitutional in violation of the First and Fourteenth Amendments to the Constitution of the United States in that:

(i) it operates as a prior restraint on freedom of speech and expression.

Plaintiff's Notice of and Motion for Temporary Injunction and to Convene Three-Judge Court—Filed May 3, 1966.

(b) The enforcement of the said statute will cause immediate and irreparable injury to the plaintiff.

2. To convene for the purpose of hearing and determining this application for a preliminary injunction and this cause, a statutory court of three judges at least one of whom shall be a circuit judge, in accordance with the provisions of Section 2284, Title 28, United States Code;

3. Such other and further relief as to the court may seem just.

Dated: New York, New York, April 28, 1966.

Emanuel Redfield, Attorney for Plaintiff, Office & P. O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

To:

Aaron E. Koota, Esq., Municipal Building, Brooklyn, New York.

CLERK'S NOTE

Amended Complaint and Exhibit I thereto are omitted from the record here as they are printed at pages 2-6 supra.

Affidavit of Service by Mail (omitted in printing).

[File endorsement omitted]

Defendant's Notice of Motion Pursuant to Rule 12b (1)(6) F.R.C.P. to Dismiss Amended Complaint on Jurisdictional Grounds and for Failure to State a Claim Upon Which Relief Can Be Granted—Filed May 4, 1966.

In the United States District Court

Eastern District of New York

Civil Action File No. 375-1966

[Title omitted]

Defendant's Notice of Motion Pursuant to Rule 12b (1)(6) F.R.C.P. to Dismiss Amended Complaint on Jurisdictional Grounds and for Failure to State a Claim Upon Which Relief Can Be Granted—Filed May 4, 1966.

Sir:

Please Take Notice that upon the amended complaint filed in this action and the annexed affidavit of Irving L. Rollins, sworn to the 3rd day of May, 1966, the undersigned will move this Court at a Term for Motions to be heard at the United States Courthouse in the Federal Building, 225 Washington Street, Borough of Brooklyn, City and State of New York on the 18th day of May, 1966 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order dismissing the amended complaint herein pursuant to Rule 12b (1)(6) of the Federal Rules of Civil Procedure on the grounds that (a) this Court lacks jurisdiction of the subject matter of said amended complaint; and (b) that such amended complaint in the absence of diversity of citizenship fails to state a claim within the original jurisdiction of the United States District Court upon which relief can be granted; and for such other and further relief as to the Court may seem just and proper.

[File endorsement omitted]

Affidavit of Irving L. Rollins.

Dated: New York, New York, May 3, 1966.

Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for Defendant, By Irving L. Rollins, Assistant Attorney General, 80 Centre Street, New York, New York 10013.

To: Emanuel Redfield, Esq., Attorney for Plaintiff, 60 Wall Street, New York, New York 10005.

Affidavit of Irving L. Rollins, in Support of Motion.

AFFIDAVIT—Filed May 4, 1966

Civil Action File No. 375-1966

State of New York,
County of New York, ss.:

Irving L. Rollins, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the office of Hon. Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the defendant herein. The facts hereinafter stated are based upon official record made available to me.

2. I submit this affidavit in support of the defendant's motion pursuant to Rule 12b (1)(6) of the Federal Rules of Civil Procedure to dismiss the amended complaint in the above entitled action on jurisdictional grounds and for failure to state a claim upon which relief can be granted.

3. That Section 781-b of the Penal Law of the State of New York which the plaintiff seeks by the subject action

to declare unconstitutional as violative of the First and Fourteenth Amendments to the Constitution of the United States by allegedly inhibiting the freedom of expression was last amended in its present provisions by Chapter 576 of the Laws of 1962 effective September 1, 1962. This amendment was effected by and as part of the program of Hon. Louis J. Lefkowitz, Attorney General of the State of New York. As New York's Chief Law Enforcement Officer, he was empowered to investigate and prosecute cases arising under the Election Law and under the provisions of the Penal Law relating to crimes against the elected franchise (N.Y. Executive Law, § 69). As the 1962 Legislative Annual shows, the Attorney General wrote the following memorandum to the New York Legislature with reference to such statute:

> "*Printing of political literature* S.I. 1967, Pr. 4531, Conklin Ch. 576
>
> Penal Law, § 781-b. This is an amendment to the 'Printers Ink' law of the early nineteen hundreds. This law currently provides that either the name and address of the printer, or the name and address of the sponsor or person requesting the printing, be printed thereon. In practice, only the printer's name usually appears and the bill is generally ineffectual in dealing with faults or scurrilous campaign literature.
>
> The proposed amendment would require the name and address of the person or group which caused the printing or reproduction of the literature to be printed thereon, in addition to the name and address of the actual printer.
>
> In the 1961 democratic primary election in the city of New York, unusually violent and untruthful anonymous allegations and statements were widely printed and distributed. While in some instances the names of the individuals believed to be responsible were

traced out, responsibility could not be definitely determined.

It would seem any person or committee which reaches the public in writing regarding any person or program of a political nature should accept responsibility for the printed material and its accuracy or answer to any person hurt by any false statement so printed or reproduced.

This bill is part of the program of the Attorney General."

Irving L. Rollins, Assistant Attorney General.

Sworn to before me this 3rd day of May, 1966.

Charles A. LaTorella, Jr., Assistant Attorney General of the State of New York.

Affidavit of Service (omitted in printing).

Opinion of Rosling, J., May 20, 1966.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66-C-375

SANFORD ZWICKLER, Plaintiff,

—against—

AARON E. KOOTA, as District Attorney of the County of Kings, Defendant.

Appearances:

Emanuel Redfield, Esq., Attorney for Plaintiff.

Aaron E. Koota, Esq., District Attorney of the County of Kings;

Irving L. Rollins, Esq., Assistant Attorney General, Of Counsel.

OPINION—May 20, 1966

ROSLING, J.

Plaintiff moves for an order granting a preliminary injunction in his favor enjoining the defendant District Attorney of Kings County from interfering with his pro-

[File endorsement omitted]

posed distribution of a political leaflet. It is plaintiff's expressed plan that the distribution is to be anonymous in the sense that the leaflet will not comply with the requirement of § 781-b of the Penal Law of the State of New York to print or reproduce on the document the name and post office address of the "printer" as defined in such section.[1]

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[1] § 781-b. Printing or other reproduction of certain political literature.

"No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also so printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

"The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal."

Section 782 declares a first offense a misdemeanor punishable by imprisonment for not more than one year or by a fine of not less than $100 nor more than $500, or by both such fine and imprisonment. A person convicted of a misdemeanor is as to a second or subsequent offense guilty of a felony.

Contending that the enforcement of the statute will cause immediate and irreparable injury to the plaintiff, he additionally asks that a statutory court of three judges be convened in accordance with the provisions of 28 U.S.C. § 2284. Plaintiff maintains that the statute establishing the offense is unconstitutional in its infringement of his rights under Amendments 1 and 14 of the Constitution of the United States.

Defendant cross-moves for an order dismissing the complaint pursuant to Rule 12(b)(1)(6) of the Fed. R. Civ. P. on the ground (a) that this court lacks jurisdiction of the subject matter and (b) that the complaint in the absence of diversity of citizenship fails to state a claim within the original jurisdiction of the United States District Court upon which relief can be granted. In support of his motion plaintiff submits a verified complaint which in its detail violates the prescription of Fed. R. Civ. P. 8(a) that a pleading shall contain a short and plain statement of the claim, but this very detail supplies sufficient evidentiary

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[2] Reed Enterprises v. Corcoran, 354 F.2d 519 (D.C. Cir. 1965) at p. 522: "Ordinarily, in injunction proceedings seeking to restrain enforcement of an allegedly unconstitutional statute, once a substantial question of constitutionality is raised and the complaint 'at least formally alleges a basis for equitable relief,' a three-judge court is required. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715, 82 S. Ct. 1294, 1296, 8 L.Ed.2d 794 (1962). Here the allegations in the complaints unquestionably outline a basis for equitable relief. For the purpose of determining whether three-judge courts are required, these allegations, unless obviously colorable, must be taken as true, and the answers of the Government addressed to three-judge courts."

data to constitute the pleading an adequate affidavit in support of the motion.[2] It would appear that a substantial question is not foreclosed by earlier decision.[3]

Finding, therefore, that the hearing of plaintiff's motion by a three-judge district court is appropriate, the court has, pursuant to 28 U.S. Code 2284, notified the Chief Judge of this Circuit of the application and requested him to designate two other judges to serve with the undersigned as members of the court to hear and determine the action. Plaintiff's motion insofar as it seeks a temporary injunction and defendant's cross-motion to dismiss the complaint will upon such court being constituted be referred to it for hearing and determination.

Settle order on notice.

George Rosling, U. S. D. J.

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[3] Bailey v. Patterson, 369 U.S. 31, 82 S. Ct. 549 (1962); Talley v. California, 362 U.S. 60, 80 S. Ct. 536 (1960); Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116 (1965).

Order Designating Judges—May 24, 1966.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66-C-375

[Title omitted]

ORDER DESIGNATING JUDGES—May 24, 1966

Having been notified by the Honorable George Rosling, United States District Judge for the Eastern District of New York, that an application has been filed in the above matter for relief pursuant to Title 28 United States Code Section 2281, pursuant to Title 28 United States Code Section 2284 I hereby designate the following judges, in addition to Honorable George Rosling, to hear and determine said cause as provided by law: Honorable Irving R. Kaufman, United States Circuit Judge, and Honorable Joseph C. Zavatt, United States District Judge for the Eastern District of New York.

It Is Hereby Ordered that this order be filed in the above entitled cause in the said District Court.

J. Edward Lumbard, Chief Judge, United States Court of Appeals for the Second Circuit.

Dated: New York, N. Y., May 24, 1966.

[File endorsement omitted]

Notice of and Order Granting Motion to Convene a Three-Judge Court, Etc.—Filed May 31, 1966.

In the United States District Court

Eastern District of New York

Civil No. 375/1966

[Title omitted]

Notice of and Order Granting Motion to Convene a Three-Judge Court, Etc.—Filed May 31, 1966

Please Take Notice that the within order will be presented for settlement to the Hon. George Rosling, on May 27, 1966, at 10:00 A.M.

Dated: New York, New York, May 23, 1966.

Yours, etc.,

Emanuel Redfield, Attorney for Plaintiff, Office & P. O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

To: Louis J. Lefkowitz, Esq., Attorney for Defendant, 80 Centre Street, New York, New York.

[File endorsement omitted]

Order, dated May 31, 1966.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

The plaintiff having moved this court for an order granting a temporary injunction and for the convening of a three-judge court pursuant to 28 U.S.C. Section 2284, and the defendant having moved this court for an order dismissing the amended complaint, and the court having considered the amended complaint in support of the motion and the affidavit and motion in opposition thereto, and having heard the arguments of counsel, it is

Ordered, that the motion of the plaintiff for an order to convene a three-judge court pursuant to 28 U.S.C. Section 2284 be and the same hereby is granted; and it is further

Ordered, that the motion of the plaintiff for a temporary injunction and the motion of the defendant for the dismissal of the amended complaint are hereby referred to said three-judge court for hearing and determining said cause.

Dated: New York, New York, May 31, 1966.

George Rosling, United States District Judge.

Affidavit of Service by Mail (omitted in printing).

Excerpt of Hearing of June 9, 1966.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63-C-375

SANFORD ZWICKLER, Plaintiff,

—against—

AARON E. KOOTA, as District Attorney for the County of Kings, Defendant.

EXCERPT OF HEARING OF JUNE 9, 1966

United States Court House
Brooklyn, New York
11:00 o'clock A. M.

Before:

Honorable Irving R. Kaufman, United States Circuit Court Judge Honorable Joseph V. Zavatt, Chief Judge, United States District Court, Honorable George Rosling, United States District Court Judge.

[File endorsement omitted]

Appearances:

Emanuel Redfield, Esq., Attorney for Plaintiff.

Louis J. Lefkowitz, Esq., Attorney General, State of New York, Attorney for Defendant, By: Irving L. Rollins, Esq., Assistant Attorney General.

Excerpt of Hearing of June 9, 1966.

The Clerk: Civil Hearing. Sanford Zwickler versus Aaron E. Koota, District Attorney, Kings County.

Mr. Redfield: Ready for the plaintiff.

Mr. Rollins: Ready for defendant.

Judge Kaufman: How do you want to proceed on this? Do you want to argue your motion to dismiss first, or do you want to argue your application first?

Mr. Rollins: I will take any recommendation the Court makes.

Mr. Redfield: It doesn't make any difference.

Judge Kaufman: I think it will put it in better perspective if we heard your application to dismiss.

Mr. Redfield: May I suggest, before we begin, your Honor, that counsel for both sides have agreed between themselves that this motion be considered as looking toward a final judgment.

Judge Kaufman: In other words, we are to consider this the hearing on the application for a permanent injunction?

Mr. Redfield: Yes, sir.

Notice of and Order Denying Plaintiff's Motion for Preliminary Injunction and Granting Defendant's Motion to Dismiss the Complaint—Filed September 29, 1966.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket #66 Civ. 375

[Title omitted]

NOTICE OF AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND GRANTING DEFENDANT'S MOTION TO DISMISS THE COMPLAINT—Filed September 29, 1966

Please Take Notice that the within order will be presented for settlement on September 22, 1966, at 10:00 A.M. at the United States District Court, Eastern District of New York.

Dated: New York, New York, September 20, 1966,

Yours, etc.,

Emanuel Redfield, Attorney for Plaintiff, Office & P. O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

To: Louis J. Lefkowitz, Esq., Attorney General, 80 Centre Street, New York, New York.

[File endorsement omitted]

Notice of and Order Denying Plaintiff's Motion for Preliminary Injunction and Granting Defendant's Motion to Dismiss the Complaint—Filed September 29, 1966.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket #66 Civ. 375

[Title omitted]

ORDER

The plaintiff, having moved for a preliminary injunction in favor of plaintiff to enjoin enforcement of Section 781-b of the Penal Law of the State of New York on the ground the said law is unconstitutional, and for the convening of a statutory three-judge court to hear said application, and the defendant having moved for an order dismissing the complaint, and the motion for the convening of a statutory three-judge court having been granted by the Hon. George Rosling, United States District Judge, and the said court consisting of the Hon. Irving Kaufman, Circuit Judge of the Second Circuit, the Hon. Joseph C. Zavatt, Chief Judge of the United States District Court for the Eastern District of New York and the Hon. George Rosling, United States District Judge for the Eastern District of New York, having been convened on June 9, 1966 and the said application having been heard on said date and the said court having filed its opinion on September 19, 1966 in favor of the defendant, Judge Rosling dissenting, it is

Ordered, that the motion of the plaintiff for a preliminary injunction be and the same is hereby denied; and it is further

Ordered, that the motion of the defendant to dismiss the complaint be and the same hereby is granted.

Dated: the 29 day of September, 1966.

Irving R. Kaufman, United States Circuit Judge.
Joseph C. Zavatt, United States District Judge.

Affidavit of Service by Mail (omitted in printing).

Opinion and Decision of Three-Judge Court.

66-C-375

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

SANFORD ZWICKLER,

Plaintiff,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Defendant.

Before: KAUFMAN, Circuit Judge, ZAVATT, Chief Judge, and ROSLING, District Judge.

APPEARANCES:

EMANUEL REDFIELD, Esq., Attorney for Plaintiff.

LOUIS J. LEFKOWITZ, Esq., Attorney General of the State of New York, Attorney for Defendant.

SAMUEL A. HIRSHOWITZ, Esq., First Assistant Attorney General.

BRENDA SOLOFF, Esq., Assistant Attorney General, of Counsel.

ROSLING, J.

The mandate of the Supreme Court upon reversal in the context of its opinion[1] requires this three-judge court to determine whether the facts alleged in the plaintiff Zwickler's complaint discloses a controversy with the defendant

District Attorney of sufficient substance to warrant the award of a declaratory judgment. Should we so hold we are called upon then to adjudicate whether the New York statute which plaintiff impugns is so "repugnant to the guarantees of free expression secured by the Federal Constitution" that it should be voided, with or without a grant of injunctive relief against its enforcement for future violation through criminal prosecutions hereafter brought.

The subject statute is § 781-b of the Penal Law of New York State, as in force on April 22, 1966, the date of the inception of the action.[2] In broad outline, as pertinent to plaintiff's situation, the provision, now superseded without change by Election Law § 457, made it a crime to distribute for another, among other things, *any* handbill in quantity which contained *any* statement concerning any candidate in connection with *any* election of public officers, unless there were printed thereon the name and post office address of the printer thereof and of the person at whose instance such handbill was so distributed. The penalties established for infraction were severe. A first offense was declared a misdemeanor; succeeding violations constituted felonies.[3]

Zwickler was convicted of violating § 781-b by his distribution of anonymous handbills no more than mildly critical of a speech delivered on the floor of the House of Representatives by a United States Congressman who was at the time (1964) standing for re-election. The conviction was reversed by the New York Supreme Court, Appellate Term, on state law grounds. The memorandum on reversal stated that the constitutional question had not been reached.[4] The New York Court of Appeals affirmed without opinion, 16 N. Y. 2d 1069.

Zwickler next invoked the Federal District Court's jurisdiction under the Civil Rights Act, 28 U.S.C. § 1343, and the Declaratory Judgment Act, 28 U.S.C. § 2201, by bringing this action against the District Attorney of Kings

County in which he sought a declaration that § 781-b was unconstitutional and an injunction against its enforcement.

We must first decide whether the facts, set out in some detail below, present a controversy of sufficient immediacy to support action for declaratory judgment. We hold that they do and, hence, such declaration should be made.

The statute reviewed is not one which has lapsed into "innocuous desuetude" through a legislature's prolonged disregard and "prosecutorial paralysis" so that the issue of its constitutionality is not here justiciable. We are not in Zwickler confronted as was the court in *Poe* v. *Ullman,* 367 U. S. 497, 81 S. Ct. 1752 (1961), cited by defendant, with eighty years of inactivity on the part of state authorities in implementing the penal statute[5] which the plaintiff had exhumed and proffered to the court so that its invalidity might be declared and theoretical menace to plaintiffs abated. As basis for its rejection of plaintiff's plea for relief four justices of the court in *Poe* joined in the observation that the fact that the state "has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication." 367 U. S. at p. 508. The fifth justice whose concurrence was in the judgment alone does not in his brief memorandum evince a precise agreement with the language quoted.

The thrust of *Poe's* plurality opinion is in effect that whatever private conduct the several plaintiffs originally contemplated taking was in no realistic sense inhibited by the existence of a statute which by "tacit agreement" the Connecticut prosecutors had undertaken not to enforce. The court in a collateral threat of such tenuity could find no significant deprivation by the state of life and liberty without due process of law.

It is otherwise where claims of abridgment of First Amendment freedoms to speak and publish are in question.

The chill of a penal restraint on utterance blights those freedoms by its mere presence. "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *N.A.A.C.P.* v. *Button,* 371 U. S. 415, 433, 83 S. Ct. 382, 338 (1963). "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski* v. *Pfister,* 380 U. S. 479, 487, 85 S. Ct. 1116, 1121 (1965).

While reported prosecutions under § 781-b have been infrequent,[6] this is not necessarily the measure of the effectiveness of the statute to rein in dissent.

A brief review of § 781-b in its mutations as successive legislatures from time to time revisited and strengthened the provisions offers proof of the abiding faith of the law makers in its inhibitory force upon those whom it was intended to chasten. In its most recent form it survived, as Election Law § 457, a massive elision from the Penal Law of what was dead-letter and obsolete, and the effective date, a scant six months removed, betokens a censorial force that is far from spent.

As a penal neophyte (added by the L. 1941, c. 198, effective Sept. 1, 1941), the provision interdicted anonymity in respect of political literature which touched only the election of *public* officers and of candidates for nomination to *public* office.

Effective April 19, 1957, an amendment (L. 1957, c. 717), brought within its lengthening reach the humble post card, and broadened obligatory self-disclosure to sponsorship of matter relative to propositions and amendments of the State Constitution to be voted upon at general elections.

An amendment enacted in 1962 by chapter 576 effective September 1st of the same year generated the version of

the law to which the complaint sub jud. is addressed. The scope of the provision was by such amendment widened so that it would thereafter encompass within its roster of potential felons anonymous publishers and distributors, whereas earlier only printers and reproducers of what was circulated had been menaced. The circle of eligible beneficiaries of the statute as amended was, moreover, enormously expanded, for this was now to include *party* officials and candidates for *party* position as well.

Recodification of the 1966 Penal Law, earlier adverted to, brought in its wake redistribution of many special provisions found therein, and, not inappropriately, as part of these shiftings of locale, § 781-b was translated unchanged to its current situs in the Election Law.[7] The continuing vitality of legislative purpose is made manifest by such reenactment.

The attempt of defendant to moot the controversy and thus to abort a declaration of constitutional invalidity by citing the circumstance that the Congressman concerning whom the Zwickler handbill was published has since become a New York State Supreme Court Justice must fail. When this action was initiated the controversy was genuine, substantial and immediate, even though the date of the election to which the literature was pertinent had already passed. Zwickler had been arrested as he stood in a public street the week before the election, distributing handbills.[8] Their content was germane to the current political campaign. His had been a "citizen's arrest" made by an attorney-member of a political club located a scant 150 feet distant from where Zwickler had stationed himself to make such distribution. The Congressman-candidate was the district leader,—the office is an elective party position—, of this club. The attorney was a precinct captain of that club. He testified to the incident as follows:

He had asked Zwickler

> "[w]ho gave you the authority to hand out, who printed this literature, who is the name of the sponsor?" He said, 'none of your business.'"
>
> * * *
>
> "I said, well you know, you are violating the law. He said, if I am violating the law why'nt you have me arrested, so I said, well, I asked Mr. Levine to go and get an officer and asked the officer to make this civil arrest. They called the police station. The lieutenant and the sergeant came down with a police car and finally he consented to go into the police car and we went down to the police station and I made this arrest. When I came down there I said if he gives me his name and address and who sponsored this literature I will not make the complaint and he refused to do that and the lieutenant had no other alternative but to book him on this charge."

The charge was prosecuted on behalf of the state by an *Assistant District Attorney* of the county. Although the "offense" was committed on October 29, 1964, the case was not tried until December 11, 1964, weeks after the general election had been held. More weeks elapsed before, on February 10, 1965, Zwickler was adjudged guilty and sentenced. The punishment meted out by the court was 30 days imprisonment in the Workhouse. Sentence was suspended but its menace hung over him. For a like offense subsequently committed § 782 admonished him that he would be indictable on a felony charge.

In the appeal to the Appellate Term of the Supreme Court which followed, the state as respondent continued to be represented by the District Attorney. That court on April 23, 1965, reversed and dismissed, but explicitly

failed to reach the question of constitutionality (see supra p. 3 and footnote appended). The prosecutor yet gave no hint of any abating of zeal. Further appellate consideration was not automatic, but was premised on leave being granted by a judge of the State Court of Appeals. Permission was applied for and obtained.

It was not until December 1, 1965, that the Court of Appeals by its affirmance, rendered without opinion and, hence, without reaching the constitutional question, upheld the action of the Appellate Term. Until it had done so, Zwickler could have been foolhardy indeed had he chosen to circulate political literature for the 1965 elections without certifying its provenance as § 781-b enjoined. Commission of a second and similar offense would, in the event the Court of Appeals restored the original judgment of conviction, have confronted Zwickler with the very real possibility that the trial judge would reinstate the 30 day sentence of imprisonment which he had suspended, and might have drawn a felony indictment as well.

The consequences thus evoked were too dangerous for Zwickler to ignore. He chose, as a prudent alternative to the martydom that he might have embraced, to file his current complaint in this court. The suit was begun with reasonable promptitude on April 22, 1966, less than five months after the Court of Appeals' inconclusive affirmance. It is seen, therefore, that no dilatoriness on his part has prolonged the chill of his first conviction. Indeed, our own abstention after he brought the action has markedly protracted his period of uncertainty.

Zwickler's complaint, quite properly, instances this seminal episode of harassment as illustrative of the impact upon him of an overbroad statute and as giving substance and immediacy to the threat of future inhibitory action which justify his demand for a declaration of invalidity.

The fortuitous circumstance that the candidate in relation to whose bid for office the anonymous handbill was circulated had, while vindication inched tediously forward, removed himself from the role of target of the 1964 handbill does not moot the plaintiff's further and far broader right to a general adjudication of unconstitutionality his complaint prays for. We see no reason to question Zwickler's assertion that the challenged statute currently impinges upon his freedom of speech by deterring him from again distributing anonymous handbills. His own interest as well as that of others who would with like anonymity practice free speech in a political environment persuade us to the justice of his plea.

Evers v. *Dwyer,* 358 U. S. 202, 79 S. Ct. 178 (1958), provides the rubric for our holding and a gloss upon it. In *Evers* the Supreme Court considered, and held appropriate for its determination, the claim of a Negro resident of Memphis, Tennessee, that he was entitled to a judicial declaration in his own behalf and for others similarly situated that he was authorized in the exercise of a constitutional right to travel on a bus without being subjected under state law to segregated seating arrangements because of race. He had boarded the bus on only a single occasion, admittedly to test that right, and had left the bus when threatened with arrest for essaying to exercise it.

Despite the inchoate nature of his experience the court accepted jurisdiction and struck down the provision as invidious. The standard *Evers* articulates is not, however, to be limited to the particular rights it vindicates. With a broader reach and by necessary logic it draws beneath its protective canopy the grievances of those who are subjected by statute to special disabilities in the exercise of First Amendment freedoms as well. The aborting of the incident which was cited as illustrating the invasion of the right in *Evers* did not abate the "actual controversy."

This was held to be substantial and persistent until it should be resolved by the declaration solicited by petitioner. So long as the right remained unvindicated, he preserved "a substantial, immediate and real interest in the validity of the statute which imposes the disability" and was entitled to have that right adjudged. 358 U. S. at p. 204, citing *Gayle* v. *Browder,* 352 U. S. 903, 77 S. Ct. 145 (1956).

The underlying controversy does not cease to serve as a predicate for such judicial declaration notwithstanding that the plaintiff halts his challenge short of arrest, as in Evers, nor of a second arrest as in the case of Zwickler. "We do not believe that appellant, in order to demonstrate the existence of an 'actual controversy' over the validity of the statute here challenged," the *Evers* opinion reads (p. 204), "was bound to continue to ride the Memphis buses at the risk of arrest if he refused to seat himself in the space in such vehicles assigned to colored passengers."

The declaratory judgment action is designed precisely to give one, potentially a defendant in a criminal prosecution, access to a judicial determination prior to actual arrest when the facts indicate a sufficient basis for his belief that conduct he deems protected under the First Amendment will subject him to such prosecution.

Reaching, accordingly, the plaintiff's challenge to the constitutionality of § 781-b, we turn to a consideration of his contention that the statute is impermissibly "overbroad" in that it imposes its obligations and sanctions indiscriminately upon those whose writings politically circulated fall within the protection of the First Amendment and those who, by the criminal content of their text, have placed themselves outside the pale of such protection. The supplemental brief defendant now submits concedes that the statute does indeed make no distinction between the two groups.[9] Thereby the Attorney General yields as no

longer tenable the position he earlier maintained at the hearing before us that the overbroad statute could be reduced to a constitutional dimension by reading into it attenuating decisions of the state courts yet to be rendered. By such judicial snipping and cropping the state's attorney hoped ultimately so to circumscribe the statute's intent that only such political literature as was criminally libelous would be brought under constraint to disclose sponsorship. For those who were appropriately discreet in their political criticism, or, for that matter, in according praise and approval, the statute in express terms being operative as to both pro and con, anonymity would be lawful and go unwhipped. Thus the requisite narrowing of the statute to satisfy First Amendment proscriptions would, hopefully be achieved.

The legislative and judicial syllogism which led the Attorney General to propose such argument initially, and now compels him to abandon it in favor of his current thesis that anonymity alone suffices in a politcal context to delineate the misdemeanor-felony irrespective of the truth or falsity of what is circulated, is clear, but at the same time provides its own refutation. Central to defendant's dilemma is *Talley* v. *California,* 362 U. S. 60, 80 S. Ct. 536 (1960), the force of which cannot be limited to the answer the court gave to the factual question posed to it, namely, "whether the provisions of a Los Angeles City ordinance restricting the distribution of handbills abridge[s] the freedom of speech and press secured against state invasion by the Fourteenth Amendment of the Constitution."

The city's counsel had urged as underpinning constitutionality that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. "Yet," the court rejoined, "the ordinance is in

no manner so limited, nor have we been referred to any legislative history indicating such a purpose." The opinion is, however, quick to disclaim any implication that an ordinance thus conceived and focused would survive the constitutional challenge if made. The opinion continues (362 U. S. at p. 64):

> "[W]e do not pass on the validity of an ordinance limited to prevent these or any other supposed evils. This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires.
>
> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Lovell v. City of Griffin, 303 U. S. at page 452, 58 S. Ct. at page 669."[10]

Two years after it was decided the courts of New York State were themselves to read the *Talley* teachings in such expansive sense. In *People* v. *Mishkin*, 17 A. D. 2d 243 (1st Dept. 1962), aff'd without opinion, 15 N. Y. 2d 671 (1964), section 330, subd. 2 of the state's General Business Law came under their consideration. The provision as then in force required that *every* publication other than newspapers and magazines should "conspicuously have imprinted * * * the true name and address of the publisher or printer."

The Appellate Division in a brief memorandum which affirmed a finding of Mishkin's guilt under counts not here pertinent charging violation of an obscenity statute voided

his conviction as to other counts filed under the General Business Law. The court grounded the reversal on a determination that § 330 subd. 2 was unconstitutional under constraint of *Talley*. The *Mishkin* memorandum contained an obiter which the legislature, as noted shortly, later construed as a guide for an amendment which by mitigating the force of the original provision placed it, hopefully, beyond the strictures of the Talley teachings. The Appellate Division's comment read:

> "The District Attorney suggests that the statute may be found constitutional if its application is limited to obscene publications for there would be a purpose in facilitating the discovery of the publisher. But the statute itself is not so limited, and there is nothing to indicate that this was the legislative purpose. We do not reach the question whether such a purpose would validate the statute."

Taking the negative expression in the final sentence of the Mishkin dictum quoted above as an affirmation of its converse, which it assuredly was not, the legislature proceeded to amend the second subdivision of § 330 so that its mandate and the sanctions for violation were thereafter to be operative upon only such writings as were "composed or illustrated as a whole [so] as to be devoted to the description or portrayal of bondage, sadism, masochism or other sexual perversion or to the exploitation of sex or nudity." These writings, but not those free of the taint described, were under the statute required to set forth at the end of the published matter the name and address of the publisher or printer.

Whether the Mishkin-prompted amendment, upon the validity of which the courts of the state do not appear as yet to have ruled, will be able to withstand further *Talley*

oriented attacks does not here concern us, for § 781-b, the provision we review, has been subjected to no such narrowing. The legislature has not amended it, nor has any court interpreted it in such fashion that anonymity is to be penalized only as to hardcore foulness which the First Amendment will not protect.

Defendant's problem has, indeed, been compounded by a negative legislative action. For the same recodification of the Penal Law, effective September 1, 1967, which transferred § 781-b to the Election Law, therein to be renumbered § 457, has through omission repealed without comment the ancient provisions which theretofore constituted and delineated the crime of libel.[11] One may now, therefore, in the State of New York with a curious impunity, save for exposure to a claim for civil damages, circulate an anonymous tract which falsely charges a clergyman with adultery, but one dare not in an anonymous handbill truthfully publicize the sale of elective office lest he be held to answer criminally.

Anonymity alone, according to defendant, is the touchstone of the offense, but only if perpetrated in a political environment. Government assistance to a public figure, however, in ferreting out a "traducer" whom he may the more readily identify and from whom he may seek civil damages as balm for his individual smart at criticism of his official performance weighs in the balance as too high a toll to be exacted from First Amendment freedom of expression for all. The freedom to animadvert upon public figures and affairs primes all others.

Nor does it avail defendant to urge upon us that § 781-b "protects the integrity of the electoral process * * * by facilitating the enforcement of various anti-corruption provisions in Election Law."[12]

The provisions of that law which the brief brings forward as the strongest it can muster in justification of this undercutting of the First Amendment focus on matters unrelated to the "protected liberties", and, so to speak, tangentially abrade them. Sections 320 through 328, the first of those cited by the Attorney General, comprise Article 13 of the Election Law, which is captioned "Campaign Receipts, Expenditures and Contributions". They contain directions for the filing at specified intervals by political committees, candidates and other persons of relevant statements.

The other sections tendered as support were transferred from their original home in the Penal Law under the revision effective September 1, 1967, and now are incorporated in Article 16, a new division of the Election Law, entitled "Violations of the Elective Franchise." Nothing in their content indicates a direct legislative purpose that implementation of these administrative regulations touching the exercise of the elective franchise shall diminish or erode the major First Amendment right to speak freely in political matters. Of these provisions § 447 denounces and penalizes political assessments on public employees; § 454 forbids candidates for judicial office, and § 460, corporations, to make political contributions.

It is true—if one were to follow defendant's reasoning —that were every colporteur constrained by statute to disclose whose money it was that paid the printer of the tract he hawks, the information thus extruded might in some instances blaze a trail to a criminal source or misuse of funds. A constitutional right of those privileged to speak with anonymity unbreached, however, may not be disregarded to facilitate the prosecution of others who by their offending may have forfeited that right.

The current attitude of the Courts is to place the emphasis on the protection and preservation of the freedom of the many to advocate conduct or to reprehend misconduct in public affairs, not to redress the wrongs, real or fancied, of the individual office holder or aspirant, for what is uttered concerning his past or prospective management of those affairs.

"[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct". *The New York Times Co.* v. *Sullivan,* 376 U. S. 254, 273, 84 S. Ct. 710, 722 (1964). Indeed with libel no longer a crime, the civil claim asserted in a political context is well-nigh moribund, surviving only when the officer whose official conduct is aspersed can demonstrate an actual malice in the false speaking (id. p. 283). But the threat which chills free expression remains, "the fear of damage awards * * * may be markedly more inhibiting than the fear of prosecution under a criminal statute". (id. p. 277, citing City of Chicago v. Tribune Co., 307 Ill. 595, 607, 139 N. E. 86, 90 (1923)).

The more efficient administration of the ancillary procedures which concern the Attorney General must give room to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." (id. p. 270, citing Terminiello v. Chicago, 337 U. S. 1, 4, 69 S. Ct. 894 and DeJonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255).[13]

Talley declares (p. 539) that the Los Angeles ordinance which it invalidated "like the Griffin, Georgia[14] ordinance, is *void on its face*". (Emphasis supplied.) The Los Angeles provision banned distribution of handbills which did not identify their source. Registration of the distributor with the municipality, however, was not commanded.

The *Griffin* ordinance, on the other hand, while stipulating that a license be obtained before the printed matter was disseminated, did not outlaw anonymity of the sponsor.[15] *Talley's* reading of *Griffin* was that the Court in *Griffin* had similarly "held *void on its face* an ordinance that comprehensively forbade any distribution of literature at any time or place in Griffin, Georgia, without a license." (p. 537) (Emphasis supplied.)

Talley thus assimilates, as equally invalid on their face, provisions which merely bar anonymity and those which require licensing of matter which is constitutionally protected.

Talley cites *Bates* v. *City of Little Rock,* 361 U. S. 516, 80 S. Ct. 412 (1960), and *N.A.A.C.P.* v. *State of Alabama,* 357 U. S. 449, 78 S. Ct. 1163 (1958), by contrast as illustrative of invalidity, not on the face of a statute, but as generated by the *application* of the statute. Recognizing that the statute was enacted within a field of legislative competence, the Court nevertheless ruled it must be stricken as cutting too deeply into the favored First Amendment enclave. The *Talley* opinion brackets its citation of *Bates* and *N.A.A.C.P.* with a comment which marks the "void-on-face" as a distinct category from that of the "void by reason of application". Such comment reads:

> "We have recently had occasion to hold in [these] two cases that there are *times* and *circumstances* when States may not compel members of groups engaged in dissemination of ideas to be publicly identified. [citing *Bates* and *N.A.A.C.P.*]. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." (Emphasis supplied.)

In *Bates* the government had demanded the membership lists of the *N.A.A.C.P.* in ostensible aid of its power as a municipality to tax a business within its corporate limits. The Court, recognizing the taxing power as basic to the ultimate purpose and function of government, nevertheless, found the legislative action so "significantly to impinge upon constitutionally protected freedom [that] it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." In the companion *N.A.A.C.P.* case the Association successfully resisted a governmental demand that it open up for judicial visitation the corporate roster of its members and contributors.

The Attorney General's argument here that a sufficient justification may be found for overriding First Amendment freedoms in the benefit that would accrue to the authorities charged with the duty of investigating corrupt practices in election campaigns receives an answer in the *N.A.A.C.P.* case at page 461, the opinion at that point reading:

> "Similar recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to suppress speech. United States v. Rumely, 345 U. S. 41, 46-47, 73 S. Ct. 543, 546, 97 L. Ed. 770; United States v. Harriss, 347 U. S. 612, 625-626, 74 S. Ct. 808, 815-816, 98 L. Ed. 989. The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of

freedom of press assured under the Fourteenth Amendment. Grosjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660; Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 891, 87 L. Ed. 1292."

Harriss, cited by defendant,[16] and the companion *Rumely* case are noted in the foregoing excerpt only to stress the limited authority of a state to intrude upon First Amendment freedom of utterance. The cases are seen to concern special situations in which within a narrowly limited area encroachment upon First Amendment anonymity is tolerated so that an exigent national interest may be safeguarded. Beyond the bounds delineated, encroachment confronts an insurmountable bar in that Amendment. And it is in this outer precinct of freedom that § 781-b assumes, and, hence, impermissibly to function.

In *Rumely,* respondent, an officer of an organization engaged in the sale of books of a "particular tendentiousness", had refused to disclose to a "House Select Committee on Lobbying Activities" the names of those who made bulk purchases of his books for further distribution. To the Committee the lower house had delegated the task of investigating "all lobbying activities intended to influence, encourage, promote, or retard legislation." The extent of "the controlling charter of the committee's powers" came into consideration by the Court in its review of Rumely's conviction for his alleged contempt in the context outlined. Specifically, the terms "lobbying" and "lobbying activities", undefined in the Act, were, according to the Court, necessarily to be delimited to avoid "serious constitutional questions."

"Surely it cannot be denied", the Court's opinion observes, "that giving the scope to the resolution for which the Government contends, that is, deriving from it the

power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment." 345 U. S. 41, 46, 73 S. Ct. 543, 546 (1953).

Those doubts the Supreme Court laid to rest by adopting the restrictive meaning the Court of Appeals had ascribed to the enactment, namely that it was to be held applicable only to "representations made directly to the Congress, its members or committees." If "lobbying" as the term is used in the resolution were to be interpreted as compassing "attempts 'to saturate the thinking of the community'" and "to cover all activities of anyone intending to influence, encourage, promote or retard legislation" the constitutional infirmity sought to be avoided would arise.

The *Harriss* case concerned a related juridical area, that of violation of the Federal Lobbying Act (60 Stat. 812, 839; 2 U.S.C. §§ 201-270). It instances a parallel judicial pruning designed to bring a disclosure statute too diffusive in its scope within constitutional bounds. Read literally, the registration requirements of the Act were broadly imposed upon all persons whose activities were purposed "[t]o influence, directly or indirectly, the passage or defeat of any legislation by the Congress." As in *Rumely* the *Harriss* opinion held (p. 623) that "the intended method of accomplishing this purpose must have been through direct communication with members of Congress", and that the reach of the Act as thus foreshortened does not in its other provisions "violate the freedoms guaranteed by the First Amendment—freedom to speak, publish, and petition the Government." (id. p. 625).

The lobbyist may, accordingly, in anonymity constitutionally protected, purvey his wares without penalty or

restraint when his approach is to others than members of Congress.

American Communications Ass'n v. *Douds*, 339 U. S. 382, 70 S. Ct. 674 (1950), another case relied upon by defendant, concerns itself with the problem of Communist infiltration of the labor movement. This the Court found to present a danger to freedoms of speech, press and assembly so significant that these freedoms could in its view be preserved only if constitutional government itself were to survive. Protection against unlawful conduct and incitement to commit unlawful acts were held to constitute a vital national interest for survival. The safeguarding of that interest, accordingly, justified as constitutionally permissible so much of the Labor Management Relations Act, 1947, 29 U.S.C. § 159(h) as conditioned recognition of a labor organization on the filing of affidavits by its officers that they did not belong to the Communist Party nor believe in the overthrow of the government by force.

> "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech," so reads the opinion of the Court (p. 399)—"the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. The high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end indicates the solicitude with which we must view any assertion of personal freedoms. We must recognize, moreover, that regulation of 'conduct' has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas. We have been reminded that 'it is

not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control.' "

Here the conduct which the legislature reprehends and undertakes to regulate by § 781-b is, without demarcation of the boundary between the two groups, the conduct of those who are in no sense culpable and that of those who are, or at least may be held so. No "vital national interest" cries out for protection through truncation of First Amendment rights when all the threat comes from a citizen's standing at a subway exit and peddling his tracts, be they religious, political, or whatever and sundry. Nor may freedom of utterance be stifled, though the street be littered by the rain of discarded handbills. Neither the distributors, nor the distribution, but only the litterer may be proceeded against for violation of the Sanitary Code. (Schneider v. State, 308 U. S. 147, 60 S. Ct. 146 (1939). Cf. Wolin v. Port of New York Authority, 2d Cir., decided March 1, 1968. "[R]egulation of 'conduct' has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas," *American Communications Ass'n* v. *Douds, supra,* 339 U. S. at page 399, admonishes us.

The tide of judicial thinking floods too strongly today in the estuary of First Amendment freedom for any tributary of government power in its exercise to overbear it.

Thus we see the Supreme Court when it revisited the troublesome Subversive Activities Control Act in 1967, in *United States* v. *Robel,* 389 U. S. 258, 88 S. Ct. 419 (1967), with a broad stroke sweeping into the discard a major

fraction of that Act. It was an unconstitutional proscription of the First Amendment right of association, the Court held, for a statute, overbroad in its abridgment of such right, to make it unlawful for a member of a Communist-action organization to engage in any employment in any defense facility. The statute, the Court declared, could not without substantial rewriting of its clear and precise provisions be narrowed to a constitutional scope. The statute "contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights." [Citing cases.] In summation, "when legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms." (Citing cases.)

Lamont v. *Postmaster General of United States,* 381 U. S. 301, 85 S. Ct. 1493, decided in 1965, marches abreast with *Robel* and *Griswold* in rejecting earlier views[17] of the Court in this area. *Lamont* struck down a federal statute which required the department to detain and destroy unsealed mail from foreign countries determined to be communist political propaganda unless the addressee had returned a reply card sent him by the postal authorities indicating his desire to receive such piece of mail. The Court, resting its determination "on the narrow ground that [inasmuch as] the addressee in order to receive his mail must request in writing that it be delivered" ruled that the requirement amounted "to an unconstitutional abridgment of the addressee's First Amendment rights." The "affirmative obligation" to act in order to have mail released to the addressee "is almost certain to have a deterrent effect, especially as respects those who have sensi-

tive positions. * * * [A]ny addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.' The regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment. *New York Times* v. *Sullivan,* 376 U. S. 254, 270."

The case of *Mills* v. *State of Alabama,* 384 U. S. 214, 86 S. Ct. 1434 (1966), matches these others in providing a bench mark for the cresting flood. In *Mills* it appeared the legislature had assumed to promulgate a rule of "fair play" in the solicitation of votes by barring electioneering on the day the election was to be held. To hold that a newspaper editor who was charged with having wielded his pen on the forbidden day thereby rendered himself amenable to the sanctions of the statute, the State Supreme Court found itself forced to construe the provision as a valid exercise of the State's police power. The press "restriction, everything considered, is within the field of reasonableness," and "not an unreasonable limitation upon free speech." 278 Ala. 188, 195, 196, 176 So. 2d 884, 890.

The Supreme Court's views were briefly expressed and vigorously to the contrary. "Whatever differences may exist about interpretations of the First Amendment", it generalized, "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." And specifically: "It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press."

It brushed aside as of no moment the state court's apology that the statute was

> "a salutary legislative enactment that protects the public from confusive last-minute charges and counter-

charges and the distribution of propaganda in an effort to influence voters on an election day; when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over."

No "test of reasonableness" serves to save the "state law from invalidation as a violation of the First Amendment."

Penal Law § 781-b, and its successor, Election Law § 457, are, accordingly, adjudged invalid as an abridgement of rights secured by the First Amendment, and injunctive relief to implement such declaration of invalidity is decreed.

For reasons which appear from the foregoing and for want, in any event, of materiality in what the Attorney General, as movant, seeks leave to submit, his application that he be permitted to file a supplemental affidavit and the exhibit he annexes thereto is denied. The record on appeal to the state Court of Appeals on Zwickler's conviction is already before us.

Setttle order on ten days' notice returnable on or before the 24 day of May, 1968.

IRVING R. KAUFMAN,
Circuit Judge.

JOSEPH C. ZAVATT,
Chief Judge.

GEORGE ROSLING,
District Judge.

FOOTNOTES

[1] 389 U. S. 241, 88 S. Ct. 391 (1967), reversing 261 F. Supp. 985 (E.D.N.Y. 1966).

[2] Penal Law § 781-b (now superseded in identical language by Election Law § 457, added L. 1965, c. 1031, § 43 eff. Sept. 1, 1967) reads:

> "No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.
>
> "The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal."

[3] Penal Law § 782, (repealed and simultaneously re-enacted as Election Law § 458, similarly effective on September 1, 1967).

[4] "In our opinion, the People failed to establish that defendant distributed anonymous literature 'in quantity' in violation of the provisions of Section 781(b) [sic] of the Penal Law. We do not reach the question of the constitutionality of the statute involved". People v. Zwickler, Sup. Ct. App. Term, Kings Co., April 23, 1965 (unreported), as quoted in Zwickler v. Koota, 261 F. Supp. at 987.

[5] The laws whose constitutionality was challenged in Poe were "Connecticut statutes which, as authoritatively construed by the Connecticut Supreme Court of Errors, prohibit the use of contraceptive devices and the giving of medical advice in the use of such devices. In proceedings seeking declarations of law, not on review of convictions for violation of the statutes, that court has ruled that these statutes would be applicable in the case of married couples and even under claim that conception would constitute a serious threat to the health or life of the female spouse." 367 U. S. at p. 498. The Fourteenth Amendment alone was cited in the plurality opinion. First Amendment freedoms were not mentioned except in the dissents.

[6] In addition to the Zwickler prosecution there are reported People v. Clampitt, 34 Misc. 2d 766 (Ct. of Spec. Sessions 1961); and North End Democratic Club v. Attorney General, 31 Misc. 2d 1000 (Sup. Ct. Special Term, N. Y. County 1961).

[7] Section 69 of the New York State Executive Law confers upon an Attorney General of the State, whose office is elective and nonjudicial, broad powers and duties respecting "crimes against the elective franchise." Although the statute vests him with no express authority to censor or to silence criticism, the chilling effect on first amendment freedom of expression through exposure of an anonymous critic to governmental investigative procedures and, if his identity is thereby ascertained, to prosecution for his anonymity though what he has uttered be unexceptionable, is manifest. Among an Attorney General's powers are those of investigation with authority to subpoena, of execution of warrants of arrest by appointees empowered to act as peace officers, and of invocation of assistance from members of the police, sheriffs and other public officers in achieving the objectives of the section.

[8] Undisputed facts testified to before Criminal Court Judge Ryan as reported in New York Court of Appeals Record on Appeal. This document is before the Court without defendant's motion, which is accordingly unnecessary, for leave to file it as an exhibit.

[9] The footnote, defendant's brief p. 17, reads with underscoring of the original preserved:

> "Defendant does not contend, as plaintiff appears to suggest, that the statute's reach is *limited* to scurrilous or libelous literature. The statute, by its terms, does not attempt to assess the nature of the language published and does not promulgate any standards other than anonymity. The statute applies to all anonymous *campaign* literature. As will clearly appear, *infra* , the evil aimed at is anonymity and it is not the purpose of the statute to prevent *any* kind of utterance. The public is entitled to know the source of any campaign utterance. Plaintiff's contention, therefore, that the statute is 'overbroad' is wholly untenable."

[10] Justice Black, delivering the brief opinion in Talley, provides an eloquent historical note which adumbrates the path the Court has in the eight intervening years traversed and lights the way for its future libertarian course. The note reads (id. pp. 64 and 65):

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes."

[11] The sections thus omitted from the revision of the Penal Law are with their descriptive headnotes the following: § 1340—Libel defined; § 1341, Libel a misdemeanor; § 1342, Malice presumed; defense to prosecution; § 1343, Publication defined; § 1344, Liability of editors and others; § 1345, Publishing a true report of public official proceedings; § 1346, Privileged communications; § 1348, Furnishing libelous information; § 1349, Furnishing false information.

Only Penal Law § 1347 is preserved, but, renumbered § 155.05(2), is transferred to Article 155, "Larceny," of the Revised Penal Law. In new associations it is with extensive paraphrase brigaded with offenses falling generally within the definition of extortion effected by speech or silence.

[12] The Attorney General adduces § 612 of 18 U.S.C. designed to "enforce other provisions of the Federal Corrupt Practices Act,

2 U.S.C. §§ 241-256", as furnishing by its mere existence a constitutional prop for § 712-b, a provision of like import. The history he cites for the federal enactment is unhelpful. It consists of Attorney General Francis Biddle's brief letter dated April 7, 1944, addressed to the Chairman of the Committee on the Judiciary of the Senate, responsive to the Senator's request for the Justice Department's views concerning the bill. This he summarizes as one "to provide that no person shall publish or distribute any political statement relating to a candidate for election to any Federal office which does not contain the name of the person responsible for its publication or distribution."

Nothing without elaboration that the proposed law "would implement the Federal Corrupt Practices Act" and "tend to facilitate the enforcement of the provisions of that act, especially those which require reports of expenditures and contributions" and of the Hatch Act (then 18 U.S.C. § 61 (m)) limitation of $5,000 on contributions in connection with Federal elections, Mr. Biddle's letter announced: "I find no objection to the enactment of the bill." The Senate report to which the letter is appended provides no history of its own, but rests its approval of the bill on the Biddle letter. The report prefaces the Attorney General's ex cathedra with the following uninformative comment: "The Department of Justice having considered the legislation reports an *analysis* in the following letter:" (S. Rep. No. 1390, 78th Cong. 2d Sess., 2 (1944).) (Emphasis added.)

As the Senate report says too little, so the report of the "President's Committee on Civil Rights, to Secure These Rights," pp. 51-53 (1947), an additional document cited indefinitely by defendant in this context, says too much. It propounds the thesis that "the volume and skill of modern propaganda make identification of the source of an argument essential to its evaluation." Decrying the circulation of "anonymous hate-mongering or other subversive literature" the extent of which it acknowledges it does not know, the Committee declares its belief that the "principle of disclosure is * * * the appropriate way to deal with those who would subvert our democracy by revolution or by encouraging disunity and destroying the civil rights of some groups."

Talley disagrees, and the Congress has, in the score of years that have passed since these views of the Committee were expressed, made no move to implement them.

[13] Cf. Garrison v. State of Louisiana, 379 U. S. 64, 85 S. Ct. 209 (1964), in which the Supreme Court extends the New York Times principle so as to bring down the Louisiana criminal libel statute upon parallel reasoning.

[14] Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666 (1938).

[15] The ordinance does not appear to have precluded to preservation of anonymity despite the licensing procedure it established. Application by an attorney or agent for an undisclosed principal for the license was a procedure not inconsistent with the intent of the indefinitely worded provision.

[16] The defendant's brief characterizes Harriss as presenting "the most analogous situation to that in the instant case."

[17] See Lewis Publishing Co. v. Morgan, 229 U. S. 288, 33 S. Ct. 867 (1912).

Order and Decree, dated June 18, 1968.

Jun 18 1968

66-Civ.-375

ORDER AND DECREE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

SANFORD ZWICKLER,

Paintiff,

against

AARON E. KOOTA, as District Attorney of Kings County,

Defendant.

The plaintiff, having moved for a preliminary injunction in favor of plaintiff to enjoin enforcement of Section 781-b of the Penal Law of the State of New York (now Section 457 of the Election Law of the State of New York) on the ground the said law is unconstitutional, and for the convening of a statutory three-judge court to hear said application, and the defendant having moved for an order dismissing the complaint, and the motion for the convening of a statutory three-judge court having been granted by the Hon. George Rosling, United States District Judge, and the said court consisting of the Hon. Irving Kaufman, Circuit Judge of the United States for the Second Circuit, the Hon. Joseph C. Zavatt, Chief Judge of the United States District Court for the Eastern District of New York and the Hon. George Rosling, United States District Judge

for the Eastern District of New York, having been convened on June 9, 1966, and the said application having been heard on said date and the said court having filed its opinion on September 19, 1966, in favor of the defendant, Judge Rosling dissenting, and the plaintiff having appealed to the Supreme Court of the United States from the order of this court dated September 29, 1966, which dismissed the complaint, and the Supreme Court having reversed the order on December 5, 1967, and remanded the action for disposition by this court, and this court having reconvened for consideration of the briefs of the parties without holding further oral argument and the parties having stipulated at the hearing on June 9, 1966, that the court treat plaintiff's motion as one for final judgment, and the court having rendered its written decision dated May 6, 1968, holding that the case presents a justiciable controversy and is not moot, and declaring said statute to be invalid as abridging plaintiff's rights under the First Amendment to the Constitution of the United States, and that plaintiff is entitled to a decere to that effect, together with injunctive relief, it is

ORDERED, ADJUDGED AND DECREED, that the defendant's motion to dismiss the amended complaint be and the same hereby is denied; and it is further

ORDERED, ADJUDGED AND DECREED, that Section 457 of the Election Law of the State of New York, is invalid as repugnant to the Constitution of the United States in that it abridges the rights secured to the plaintiff under the First Amendment to the Constitution of the United States; and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant, Aaron E. Koota, his agents and employees, are hereby enjoined from arresting or prosecuting plaintiff under said statute; and it is further

Order and Decree, dated June 18, 1968.

ORDERED, that the defendant's application to file a supplemental affidavit together with the exhibit annexed thereto is hereby denied; and it is further

ORDERED AND ADJUDGED, that the plaintiff, Sanford Zwickler, of 7314 21st Avenue, Brooklyn, New York, do recover of the defendant Aaron E. Koota as District Attorney of Kings County Municipal Building, Brooklyn, New York, the sum of $44.36 costs as taxed.

ORDERED, that this Order and Judgment be and the same are hereby stayed to and including July 8, 1968, in order to permit the defendant, if he so chooses to appeal therefrom and to apply for a further stay to the Supreme Court or a Justice thereof.

Dated: June 18, 1968.

IRVING R. KAUFMAN,
Circuit Judge.

JOSEPH C. ZAVATT,
Chief Judge.

GEORGE ROSLING,
District Judge.

Notice of Appeal to the Supreme Court of the United States.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

66-C-375

SANFORD ZWICKLER,

Plaintiff,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Defendant.

Notice is hereby given that Aaron E. Koota, the defendant above named, hereby appeals to the Supreme Court of the United States from the final order, judgment and decree denying the defendant's motion to dismiss the amended complaint, ordering, adjudging and decreeing Section 457 of the Election Law of the State of New York unconstitutional, enjoining defendant from arresting or prosecuting plaintiff under said statute, denying defendant's application to file a supplemental affidavit and annexed exhibit, and awarding costs to plaintiff in the sum of $44.36, entered in this action on June 18, 1968.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Dated: New York, N. Y., June 26, 1968.

LOUIS J. LEFKOWITZ,
Attorney General of the
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Attorney for Defendant,
Office & P. O. Address,
80 Centre Street,
New York, N. Y., 10013.

To:
EMANUEL REDFIELD, Esq.,
37 Wall Street,
New York, N. Y.

Order, dated July 8, 1968.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1968

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellant,

v.

SANFORD ZWICKLER,

Appellee.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant, and of the opposition of counsel for the appellee thereto,

IT IS ORDERED that the judgment of the United States District Court for the Eastern District of New York, of June 18, 1968, be, and the same is hereby, stayed providing the appellant perfects and dockets his appeal in this Court on or before August 5, 1968. Should such appeal be so perfected and docketed by that date, this stay is to remain in effect pending the issuance of the judgment of this Court.

/S/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States.

Dated this 8th day of July, 1968.

Memorandum of Mr. Justice Harlan.

SUPREME COURT OF THE UNITED STATES

Washington, D. C. 20543

Re: *Koota* v. *Zwickler*.

In my opinion the appellant is entitled to the requested stay of the District Court's judgment, conditioned however upon the appellant perfecting and docketing his appeal by not later than August 5, 1968. The issue involved is substantial and important, and the judgment below in practical effect has state-wide ramifications. Particularly in the absence of any showing by the appellee that he intends to distribute anonymous handbills, appellant, it seems to me, has the better of it with respect to the equities and the issue of irreparable damage. The accelerated docketing of the appeal will ensure that the jurisdictional statement will be ripe for consideration by the Court at its first conference of the October 1968 Term.

A stay of the District Court's judgment will issue, conditioned as aforesaid.

July 8, 1968.

**Order Noting Probable Jurisdiction—
October 14, 1968.**

SUPREME COURT OF THE UNITED STATES

No. 370, October Term, 1968

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellant,

v.

SANFORD ZWICKLER,

Appellee.

In this case probable jurisdiction is noted and the case is placed on the summary calendar.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 370

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellant,

against

SANFORD ZWICKLER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellant,

against

SANFORD ZWICKLER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant, Aaron E. Koota, appeals from a judgment and order of the United States District Court for the Eastern District of New York entered on June 18, 1968 declaring § 457 of the New York State Election Law to be unconstitutional and enjoining the defendant from enforcing said statute.

Opinion Below

The opinion of the District Court is not yet reported. It is reproduced herein as Appendix "A". The order of the District Court is reproduced herein as Appendix "B".

Jurisdiction

The judgment and order of the District Court was entered on June 18, 1968. The notice of appeal was filed on July 2, 1968. The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. § 1253.

Statute Involved

New York Election Law, § 457 (formerly New York Penal Law, § 781-b):

> § 457. Printing or other reproduction of certain political literature. No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or dis-

tributed any such handbill, pamphlet, circular, post card, placard or letter without also printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term "printer" as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal. [Chap. 1031, L. 1965, eff. Sept. 1, 1967. Subject matter formerly contained in Sec. 781-b, Penal Law.]

Questions Presented

1. Does New York Election Law § 457 prohibiting the distribution in quantity of anonymous campaign literature during an election campaign constitute an abridgment of freedom of expression in violation of the United States Constitution?

2. Did the instant case present a case or controversy within the meaning of Article III of the United States Constitution warranting the granting of declaratory relief?

3. Was the granting of injunctive relief proper in the instant case?

Statement of the Case

Appellee commenced this proceeding in the United States District Court for the Eastern District of New York filed in May, 1966, seeking declaratory and injunctive relief against the enforcement of New York Penal

Law § 781-b* prohibiting the distribution in quantity of anonymous campaign literature.

The complaint alleged that appellee desired and intended to distribute in quantities of more than a thousand copies anonymous political leaflets with regard to the election campaign of 1966 "and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966" (Amend. Compl. par. 14). It alleged that appellee wished to make such distribution of a leaflet "prepared by and at the instance of a person other than the plaintiff" (Amend. Compl. par. 14) because of his belief that the statute forbidding such distribution violates the First and Fourteenth Amendments to the Constitution "in that it is an infringement of the freedom of expression" (*id.* par. 16).

The complaint sought federal relief enjoining enforcement of the statute not because appellee was being subjected to harassment of any sort and not because any prosecution was pending or imminent but because "[t]he said leaflet is embraced within the scope and intendment of the statute" (*id.* par. 17), because appellant "is a diligent and conscientious public officer and pursuant to his duties intends or will again prosecute the [appellee] . . . for his acts of distribution" (*id.* par. 18) and because, in 1964, appellee was charged with distributing an anonymous leaflet in connection with the Congressional election to be held on November 3, 1964, about four days after the date of distribution (*id.* pars. 5-6). The leaflet called on their Representative Abraham Multer, now a State Supreme Court Judge, to explain why he had voted against cutting off aid to the United Arab Republic and had announced his preference for a watered down condemnation

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* Penal Law, § 781-b is now Election Law § 457 and will be referred to as such.

of religious bigotry over a denunciation of Soviet anti-semitism. He was found guilty after a trial at which he presented no evidence. *People* v. *Zwickler* (Crim. Ct. N.Y.C. Kings Co. Feb. 10, 1965, unreported) (*id.* pars. 7-9). The judgment of conviction was "unanimously reversed on the facts" upon the failure of the People "to establish that defendant distributed anonymous literature 'in quantity'." *People* v. *Zwickler* (Sup. Ct. App. Term, Kings Co. April 23, 1965, unreported) (*id.* pars. 10-11). The reversal was affirmed without opinion by the New York Court of Appeals. *People* v. *Zwickler,* 16 N. Y. 2d 1069, 266 N.Y.S. 2d 140 (1965).

Other than the specific reference to Congressman Multer, the complaint alleged that the appellee:

> "desires and intends to distribute in the Borough of Brooklyn, County of Kings, New York . . . the anonymous leaflet herein described . . .. and similar anonymous leaflets, all prepared by and at the instance of person other than the plaintiff. The said distribution is intended to be made at any time during the election campaign of 1966 and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966." (Complaint, ¶ 14)

By order dated May 20, 1966, the Hon. George Rosling of the United States District Court for the Eastern District of New York granted appellee's motion to convene a statutory three-judge court. The Court, consisting of the Hon. Irving R. Kaufman, Circuit Judge of the United States Court of Appeals for the Second Circuit, Hon. Joseph C. Zavatt, Chief Judge of the United States District Court for the Eastern District of New York and the Hon. George Rosling, heard appellant's motion to dismiss the complaint and appellee's motions for injunctive and declaratory relief on June 9, 1966.

On September 19, 1966 the Court filed its opinion in favor of the appellant, Judge Rosling dissenting. The majority held that the Court should abstain from a decision on the merits of the application and dismissed the complaint. *Zwickler* v. *Koota,* 261 F. Supp. 985.

On December 5, 1967 this Court reversed the order of the three-judge court and remanded the action for disposition by the District Court including whether or not the complaint alleged a case or controversy or had become moot, whether declaratory judgment was a proper remedy in the instant case, whether the statute in question was repugnant to the United States Constitution, and whether, if it was, injunctive relief should be granted in addition to declaratory relief. *Zwickler* v. *Koota,* 389 U. S. 241.

On May 6, 1968, the District Court, without oral argument, rendered its written decision. It held first that the case presented a justiciable controversy. It found that the statute was not unenforced by the State, that it had recently been reenacted [in 1961], and that appellee had been prosecuted under the statute [in 1964]. It found that the controversy was genuine when initiated and continued to be real since, in spite of the fact that appellee's initial target was no longer a political candidate, that fact did not "moot the plaintiff's further and far broader right to a general adjudication of unconstitutionality his complaint prays for." (Appendix "A", p. 25.) The Court accordingly rejected proof establishing that appellant had permitted his name to appear on a campaign leaflet involving the same Multer distributed subsequent to the period specified in the complaint. The additional proof was intended to show that the statute was no deterrent to freedom of expression in political campaigns.

The Court then turned to the merits of appellee's attack on Election Law § 457. Relying on *Talley* v. *California,* 362 U. S. 60 it held the statute to be overbroad because

in the opinion of that Court it reached protected as well as unprotected speech. The Court rejected the argument that the statute was necessary to enforce the anti-corruption provisions of the New York Election Law, holding the argument insufficient when weighed against First Amendment rights. It ignored any consideration of the right of the public as citizens to the information in exercising the right to vote.

The Court, without *any* evidence that the statute had actually "chilled" free expression and, indeed, contrary to experience under the statute, found as a matter of law that the threat of disclosure chilled free expression (relying on *Bates* v. *City of Little Rock,* 361 U. S. 516 and *NAACP* v. *State of Alabama,* 357 U. S. 449) and distinguished the cases requiring disclosure cited by appellant on the ground that they represented "special situations" (Appendix "A" p. 35).*

The Court then, without any discussion, granted injunctive, in addition, to declaratory relief.

The District Court stayed the issuance of its mandate until July 8, 1968 to enable appellant to seek further stay from this Court. By order dated July 8, 1968 Justice John M. Harlan granted a further stay conditioned upon the

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* As an aside, to bolster its conclusion in this regard, the opinion of the District Court in a footnote (Note 6, Appendix "A", p. 42) refer to two state court cases involving a prior form of the statute. The first case cited was an unscccessful prosecution and the second case cited (*North End Democratic Club* v. *Attorney General,* 31 Misc. 2d 1000 [Sup. Ct., Special Term, 1961]) was not a prosecution but a proceeding involving a subpoena. Judge Rosling's reference in footnote 7 (Appendix "A", p. 42), while modified from its original form, is still uncalled for since the Attorney General is not vested by the statute with the authority to conduct prosecutions for its violation. As we have noted, the three-judge court permitted no proof upon the remand, but it is to be noted that all the major political parties supported the statute in question as did the local Bar Association and the Citizens Union.

appellant perfecting and docketing the appeal by August 5, 1968. In his memorandum granting the stay Justice Harlan stated:

> "The issue involved is substantial and important, and the judgment below in practical effect has statewide ramifications. Particularly in the absence of any showing by the appellee that he intends to distribute anonymous handbills, appellant, it seems to me, has the better of it with respect to the equities and the issue of irreparable damage."

ARGUMENT

The instant appeal presents several substantial questions of law requiring plenary consideration by this Court.

1. The holding of the District Court that New York Election Law § 457 is an unconstitutional restraint on freedom of expression is incorrect, would severely hamper the State in promoting open and honest elections and deprives the citizens of their constitutional right to full information in exercising their franchise.

The New York statute is substantially identical with statutes in 36 States* which were upheld in *Canon* v. *Jus-*

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* ALA. CODE tit. 17, § 282 (1940); ALASKA STAT. § 15.55.030 (1962); ARK. STAT. § 3-1412 (1947 Ann.); CAL. ELECTIONS CODE § 12047-49 (1965); COLO. REV. STAT. § 49-21-50 (1963 Ann.); FLA. STAT. ANN. § 104.37 (Supp. 1966); IDAHO CODE ANN. § 34-104 (1953); ILL. ANN. STAT. ch. 47, §§ 26-1.3 (1963); IOWA CODE tit. 35, § 738.22 (1966); KAN. STAT. ANN. § 25-1714 (1913); KY. REV. STAT. §§ 123.095, 123.130 (Supp. 1966); LA. REV. STAT. §18:1531 (1950); ME. REV. STAT. ANN. tit. 21, § 1575 (1964); MD. CODE Art. 33, §221 (1957); MASS. ANN. LAWS ch. 56, §§ 39, 41 (1952); MICH. STAT. ANN. § 6.1914; MINN. STAT. § 211.08 (Supp. 1963); MO. REV. STAT. tit. 9, § 129.300 (1939); MONT. REV. CODES § 94-147S (1947); NEB. REV. STAT. § 32-1131-33 (Supp. 1965); N. H. REV. STAT. tit. IV, § 70.14 (Supp. 1965);

(*Footnote continued on following page*)

tice Court, 39 Cal. Rptr. 228, 393 P. 2d 428 (1964); *Commonwealth* v. *Evans,* 156 Pa. Super. 321, 40 A. 2d 137 (1945); *State* v. *Freeman,* 143 Kan. 315, 55 P. 2d 362 (1936); *State* v. *Babst,* 104 Ohio 167, 135 N. E. 525 (1922). It is also substantially the same as a federal statute (18 U.S.C. § 612) upheld in *United States* v. *Scott,* 195 F. Supp. 440 (D. No. Dak. 1961). The District Court opinion in the instant case ignores the consistent holdings of the various state courts and fails to mention at all the federal statute and the *Scott* case upholding that statute, with which, however, the opinion of Judge Rosling is in conflict. It is significant to note that both the *Canon* and *Scott* opinions were decided after the decision of this Court in *Talley* v. *California,* 362 U. S. 60 upon which the District Court relied and both cases took account of *Talley* and distinguished it.

The question before this Court therefore of whether the States are powerless to promote their legitimate purposes of insuring the purity of the electoral process (*Burroughs and Canon* v. *United States,* 290 U. S. 534) and promoting the intelligent use of the ballot (*Katzenbach* v. *Morgan,* 384 U. S. 641; *Lassiter* v. *Northampton County Board of Elections,* 360 U. S. 45) is of national significance. Appellee himself, in submitting his views to Justice Harlan upon the application for a stay, conceded that "a novel substantive question arises in this case." Indeed, the overriding importance of the infomation sought

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(*Footnote continued from previous page*)

N. J. STAT. ANN. §§ 19:34-38.1-4 (1963); N. D. CENTURY CODE § 16-20-17.1 (1959); OHIO REV. CODE § 3599.09 (Supp. 1966); ORE. REV. STAT. tit. 23, chap. 268, § 260.360 (1955); PA. STAT. ANN. tit. 25, § 3546 (1933); R. I. ELECTION LAW § 17-23-2 (1923); S. D. CODE 1939 § 16.9930 (Supp. 1960); TENN. CODE § 2-2238 (1955); TEX. ELECTION CODE ART. 14.10 (1951); UTAH CODE § 20-14-24 (1953); VT. STAT. ANN. tit. 17, chap. 35, § 2022 (1963); VA. CODE 1950 § 24-456; WASH. R.C.W.A. § 29; 85.270 (1965); W. VA. CODE 1961, chap. 3, § 218(6) (a-b) (Supp. 1965); WIS. STAT. ANN., tit. II, chap. 12, § 12.16 (1911).

by § 457 and similar statutes is substantially increased by the relent decisions of this Court emphasizing the importance of the citizen's right to vote. See, *e.g.*, *Baker* v. *Carr*, 369 U. S. 186; *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663; *South Carolina* v. *Katzenbach*, 383 U. S. 301; *Carrington* v. *Rash*, 380 U. S. 389; *Katzenbach* v. *Morgan*, *supra*; *Mills* v. *Alabama*, 384 U. S. 214.

As the Court said in *Canon* v. *Justice Court*, *supra*, at 431:

> "It is clear that the integrity of elections, essential to the very preservation of a free society, is a matter 'in which the State may have a compelling regulatory concern.'"

New York Election Law § 457 prohibits the distribution in quantity of anonymous campaign literature. It does not seek to regulate in any manner the content of such literature. Moreover, the section is not directed to all literature printed at any time under any circumstances. *Talley* v. *California*, 362 U. S. 60. It does not restrict the circulation of anonymous leaflets dealing with ideas or even with current issues. See *Canon* v. *Justice Court*, *supra* at 431: "The statute does not prohibit the communication of ideas, nor does it attempt to regulate the content of expression." It is directed *solely* at circulars respecting candidates and propositions on the ballot. It requires only that the printer and author or sponsor be identified on leaflets circulated in quantity to influence the electorate in their choice.

In assessing a statute like § 457, three factors must be weighed. The first is whether or not there is a legitimate state purpose in enacting the legislation and a substantial need for it. *American Communications Association* v. *Douds*, 339 U. S. 382; *Schneider* v. *State*, 308 U. S. 147, 161. The second consideration is whether or not there is a "substantial connection between the breadth of disclosure demanded and the purpose which disclosure was

asserted to serve". *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U. S. 1, 93; *Shelton* v. *Tucker*, 364 U. S. 479. The third factor, a necessary corollary of the second, is whether or not the statute involves an *unnecessary* restraint on free expression and whether disclosure might unduly prejudice those of whom disclosure was required. *Communist Party of the United States* v. *Subversive Activities Control Board, supra; American Communications Association* v. *Douds, supra.* See also *Pickering* v. *Board of Education*, —— U. S. ——, 36 U.S.L. Week 4495; *United States* v. *O'Brien*, —— U. S. ——, 36 U.S.L. Week 4469, 4472.

The statute under consideration protects the integrity of the electoral process first by facilitating the enforcement of various anticorruption provisions in the Election Law. These include, for example, New York Election Law §§ 320-328 with respect to requirements for filing reports on campaign receipts, expenditures and contribution, § 447 respecting political assessments, § 454 respecting contributions from judicial candidates and § 460 respecting campaign contributions from corporations. To the extent that these sections might be circumvented by the expenditure of funds on anonymous leaflets, § 457 operates to prevent such a possibility. In this respect it is very similar to the federal provision, 18 U.S.C. § 612, which also was enacted to enforce other provisions of the Federal Corrupt Practices Act 2 U.S.C. §§ 241-256 and which was upheld in *United States* v. *Scott, supra.*

The second and at least equally important interest served by § 457 is the right of the public to identify and evaluate the sources ostensibly providing it with information and urging it to follow a certain course with respect to candidates and issues on the ballot. It cannot be denied that the disclosure of the source of information is an important factor in ascertaining the weight to be given any particular item of information or proposal. The public is

entitled to know all of the relevant factors with respect to an election, including who supports and who opposes a particular candidate. See *United States* v. *Harris*, 347 U. S. 612, 625; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288; *United States* v. *Scott*, *supra*; *Commonwealth* v. *Evans*, *supra*; *State* v. *Freeman*, *supra*. See also, *President's Committee on Civil Rights, To Secure These Rights*, 51-53 (1947) maintaining that the volume and skill of modern propaganda make identification of the source of an argument essential to its evaluation. Section 457 is thus wholly unlike the statute struck down by this Court in *Talley*, *supra*, where no valid state purpose was shown for its enactment.

Not only does publication of anonymous campaign literature pressure the public to take sides without providing information as to the source of the pressure, but it does so within a period of time which makes it difficult if not impossible to ascertain the source before the choice must be made. This is an unwarranted imposition both on the public and on the candidates. This Court has long recognized that time is of the essence in an election campaign. *Mills* v. *Alabama*, 384 U. S. 214, 220. In that case the Court recognized that a law which made it a crime in effect to answer "last minute" charges on election day was unconstitutional because that was "the only time they can be effectively answered".

The Court below refused to recognize that the above described two-fold purpose for New York Election Law § 457 at all justified the statute.* It held instead the

* Appellant does not contend that the statute's reach is *limited* to scurrilous or libelous literature. The statute, by its terms, does not attempt to assess the nature of the language published and does not promulgate any standards other than anonymity. The statute applies to all anonymous *campaign* literature and the evil aimed at is anonymity It is not the purpose of the statute to prevent *any* kind of utterance. The public is entitled to know the source of any campaign utterance. Appellee's contention, therefore, that the statute is "overboard" is wholly untenable.

statute was an unreasonable restraint on freedom of expression. However, no evidence was adduced that the statute restrains freedom of expression at all. Certainly, it does not do so on its face. It does not attempt to proscribe in any manner the content of speech. See *United States* v. *O'Brien, supra.* Nor does it require registration. *Cf. Thomas* v. *Collins,* 323 U. S. 516; *Cantwell* v. *Connecticut,* 310 U. S. 296. The District Court, nevertheless, accepted appellee's contention, with no factual support, that he would be "chilled" in his free expression if the statute remained applicable to him.

The basic purpose of the First Amendment is "free and unhindered debate on matters of public importance". *Pickering* v. *Board of Education, supra,* at 4498. See also *Ginsberg* v. *State of New York,* —— U. S. ——, 36 U.S.L. Week 4295, 4301 (Mr. Justice Stewart concurring). The most open public discussion possible, that in a group or town meeting where the identity of every speaker is known, is seldom feasible in a modern society and the mass media must substitute for the town meeting. However, the value of knowing the source of a statement or position is not thereby decreased. Any information which helps to promote an understanding of the issues and improves the possibility of the most accurate evaluation of the situation is to be encouraged. As Mr. Justice Black stated in his dissent in *Vierick* v. *United States,* 318 U. S. 236, 249:

> "[It is a] fundamental constitutional principle that our people *adequately informed* may be trusted to distinguish between the true and the false. . . . Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment." (Emphasis supplied)

There is no inherent virtue in anonymity. It is a withholding of information from the public which, if disclosed, might have a considerable bearing on the evaluation of its

content. At best, anonymity is an inadequate substitute for open discussion in a political atmosphere more receptive to such discussion. Its function is to permit the promulgation of matter which under certain circumstances would place the promulgator in real fear of reprisal. As such, it does not support, but rather is inimical to the basic purposes of the First Amendment. In *Canon* v. *Justice Court, supra* at 432, the Court observed:

> "The chief harm is that suffered by all the people when, as a result of the public having been misinformed and misled, the election is not the expression of the true public will."

Although the District Court mentions the fear of reprisal, appellee, significantly, did not. Although he has relied in the past on such cases as *Bates* v. *City of Little Rock,* 361 U. S. 516 and *NAACP* v. *State of Alabama,* 357 U. S. 449, cases where the possibility of reprisal was extremely likely and indeed, where disclosure was sought apparently only for the purpose of reprisal, not a single fact was presented substantiating such a fear in the instant case. Consequently, there has been no showing at any stage of the instant proceeding that the statute in question, which obviously serves legitimate state ends, is an unreasonable restraint on freedom of expression.

The decisions of this Court have made the fear of reprisal wholly insubstantial. Cases such as *Associated Press* v. *Walker,* 379 U. S. 47; *New York Times* v. *Sullivan,* 376 U. S. 254 and *Time, Inc.* v. *Hill,* 385 U. S. 374, now effectively insulate political criticism from the threat of libel and invasion of privacy suits except in the most outrageous and egregious cases. New York courts have liberally applied the *New York Times* case *Goldberg* v. *Goffi,* 21 A. D. 2d 517, 251 N.Y.S. 2d 823 (2d Dept. 1964), aff'd no opinion 15 N. Y. 2d 1023 (1965). *Jacobowitz* v. *Posner,* 28 A. D. 2d 706, 282 N.Y.S. 2d 670 (1967), aff'd 21 N. Y. 2d 936, 237 N. E. 2d 83. In *Goldberg,* the

Court stated: "Within the periphery of the new body of case law, we hold, on a balancing of interests, that democratic government is best served when citizens, and especially public officials and those who aspire to public office, may freely speak out on questions of public concern, even if thereby some individual be wrongly calumniated (citing cases)". Actually, the circulation of dissenting opinions upon highly emotional issues in this country in non-anonymous form is now a common-place occurrence and arises in virtually daily fashion in our newspapers, magazines and other mass communications media. The fear of reprisal does not deter such publication, nor is there any reason why it should. What the Supreme Court of California said with respect to the California statute in *Canon* v. *Justice Court, supra* at 431, is applicable to New York:

> "[T]here is nothing to indicate that the disclosure requirement, under the circumstancees of present-day California politics, would in fact substantially inhibit expression, even in the limited area to which the statute is applicable . . ."

2. Declaratory judgment was inappropriate in the instant case since there is no case or controversy between the parties.

In remanding the instant case, this Court directed the District Court to determine the propriety of declaratory relief with particular attention to whether or not the instant case presented a justiciable controversy or was moot. The Court specifically enunciated the standard by which the existence of a case or controversy was to be determined (*Zwickler* v. *Koota,* 389 U. S. 241, 244, n. 3):

> "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests, of sufficient imme-

diacy and reality to warrant the issuance of a declaratory judgment. Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U. S. 270, 273."

The opinion of the District Court did not meet the above test set forth by this Court. Other than the statement made in the complaint that appellee intends to submit "similar anonymous leaflets", and the assertion there that the statute is a deterrent, nothing was submitted by appellee to authorize declaratory judgment and, indeed, it was irrefutable that the case had become moot as respects appellee whose particular target, Mr. Multer was no longer a candidate for office or a political leader. There, obviously, was no "immediacy" and "reality" set forth in *Maryland* as requisite for declaratory judgment. See also

The Court accepted without inquiry appellee's "assertion [in the complaint] that the challenged statute currently impinges upon his freedom of speech by deterring him from again distributing anonymous handbills" (Appendix "A" p. 25) and reasoned that "his own interest as well as that of others who would with like amenity practice free speech in a political environment persuaded as to the justice of his plea (*id.*). Thus, the Court disregarded the *Maryland* standard and adopted the view that a mere challenge to the statute by any citizen was sufficient to establish a justiciable controversy adequate to support declaratory judgment.

The District Court relied on *Evers* v. *Dwyer,* 358 U. S. 202. In that case, this Court held that merely because a case is a "test" case, it is not to be denied the "case or controversy" status. Neither, however, it is to be granted such status. The plaintiff in *Evers* sought to break the segregated bus system in Memphis, Tennessee. He boarded the bus and was threatened with arrest. An issue in that case was a persuasive practice, rigidly enforced at every level of state and federal government with respect to a daily activity. The Court held that under those circum-

stances, the plaintiff had a substantially immediate and real interest in the validity of the statute'' (*id.* at 204) but went on to point out ''the federal courts will not grant declaratory relief in instances where the record does not disclose an 'actual controversy' '' (*id.* at 203), citing the *Maryland* case.

Apart from the lack of justiciable controversy at the time the complaint was filed before the 1966 election and while Mr. Multer was still a candidate for election, the fact of Mr. Multer's candidacy is past and Mr. Multer is on the State bench and as the District Court noted presumably no longer a political candidate. The case, therefore, has become moot, a consideration referred to by this Court in the remand. See, *e.g., Flast* v. *Cohen,* —— U. S. ——, 36 U.S.L. Week 4601, 4604-05; *Gray* v. *Board of Trustees,* 342 U. S. 517; *Brownlow* v. *Schwartz,* 261 U. S. 216. The evident mootness of the controversy engendered by appellee is not affected by the statement in the complaint made in 1966, which impressed the District Court in its 1968 opinion, that appellee intends to distribute ''similar anonymous leaflets'' preserves any element of controversy. Such allegation lacks any present vitality. *United Public Workers of America* v. *Mitchell,* 330 U. S. 75, 89.

In fact, appellee's only real reason for the above allegation was ''because of his belief and claim that the statute . . . is unconstitutional'' (Complaint, ¶ 16). That is a classic statement of a hypothetical, academic question. The statute proscribes activity which appellee felt compelled to undertake not because of any inherent need he had to perform the activity but only because he felt that it should not be proscribed. The statute was for appellee father to the deed. There was wholly lacking any showing that the statute was currently affecting his behavior. *Dombrowski* v. *Pfister,* 380 U. S. 479; *Baggett* v. *Bullitt,* 377 U. S. 360; *Smith* v. *California,* 361 U. S. 147. In

fact, as was indicated to this Court on oral argument and to the District Court by affidavit and exhibit (which the District Court refused to accept upon appellee, in a circular dated August 25, 1967), signed his name to an anti-Multer circular distributed in connection with the 1967 judicial election, thus demonstrating the present lack of any controversy.

3. The granting of injunctive relief by the District Court was unwarranted and in direct contravention of prior decisions of this Court.

Without *any* discussion as to its necessity, the District Court granted injunctive relief apparently as a matter of course. In its original decision in this case, this Court was careful to distinguish between the standard for declaratory judgment and for injunction and specifically reiterated its holding in *Douglas* v. *City of Jeanette,* 319 U. S. 157, in which the Court declined to issue an injunction even though it had the same day struck down the statute whose enforcement was sought to be enjoined. *Murdock* v. *Pennsylvania,* 319 U. S. 105. *Zwickler* v. *Koota, supra* at 254-55. Certainly, appellee failed to establish any of the factors which were held to require an injunction in *Dombrowski* v. *Pfister,* 380 U. S. 479. There was no showing that he was presently being barred from distribution so as to suffer irreparable damage and there was no showing that the appellant would not comply with an order granting declaratory relief. Indeed, the complaint acknowledges that appellant is a "diligent and conscientious public officer" who would act in "good faith".

The granting of the injunction was not a matter of course disposition but was required to be separately considered and justified, as this Court stated in the record. The State was entitled not to be saddled with such injunction unless such consideration and justification, absent here, was furnished.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, August 1, 1968.

Respectfully submitted,

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APPENDIX A

66-C-375

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

SANFORD ZWICKLER,

Plaintiff,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Defendant.

Before: KAUFMAN, Circuit Judge, ZAVATT, Chief Judge, and ROSLING, District Judge.

APPEARANCES:

EMANUEL REDFIELD, Esq., Attorney for Plaintiff.

LOUIS J. LEFKOWITZ, Esq., Attorney General of the State of New York, Attorney for Defendant.

SAMUEL A. HIRSHOWITZ, Esq., First Assistant Attorney General.

BRENDA SOLOFF, Esq., Assistant Attorney General, of Counsel.

ROSLING, J.

The mandate of the Supreme Court upon reversal in the context of its opinion[1] requires this three-judge court to determine whether the facts alleged in the plaintiff Zwickler's complaint disclose a controversy with the defendant District Attorney of sufficient substance to warrant the award of a declaratory judgment. Should we so hold we are called upon then to adjudicate whether the New York statute which plaintiff impugns is so "repugnant to the guarantees of free expression secured by the Federal Constitution" that it should be voided, with or without a grant of injunctive relief against its enforcement for future violation through criminal prosecutions hereafter brought.

The subject statute is § 781-b of the Penal Law of New York State, as in force on April 22, 1966, the date of the inception of the action.[2] In broad outline, as pertinent to plaintiff's situation, the provision, now superseded without change by Election Law § 457, made it a crime to distribute for another, among other things, *any* handbill in quantity which contained *any* statement concerning any candidate in connection with *any* election of public officers, unless there were printed thereon the name and post office address of the printer thereof and of the person at whose instance such handbill was so distributed. The penalties established for infraction were severe. A first offense was declared a misdemeanor; succeeding violations constituted felonies.[3]

Zwickler was convicted of violating § 781-b by his distribution of anonymous handbills no more than mildly critical of a speech delivered on the floor of the House of Representatives by a United States Congressman who was at the time (1964) standing for re-election. The conviction was reversed by the New York Supreme Court, Appellate Term, on state law grounds. The memorandum on reversal stated that the constitutional question had not been reached.[4] The New York Court of Appeals affirmed without opinion, 16 N. Y. 2d 1069.

Zwickler next invoked the Federal District Court's jurisdiction under the Civil Rights Act, 28 U.S.C. § 1343, and

the Declaratory Judgment Act, 28 U.S.C. § 2201, by bringing this action against the District Attorney of Kings County in which he sought a declaration that § 781-b was unconstitutional and an injunction against its enforcement.

We must first decide whether the facts, set out in some detail below, present a controversy of sufficient immediacy to support action for declaratory judgment. We hold that they do and, hence, such declaration should be made.

The statute reviewed is not one which has lapsed into "innocuous desuetude" through a legislature's prolonged disregard and "prosecutorial paralysis" so that the issue of its constitutionality is not here justiciable. We are not in Zwickler confronted as was the court in *Poe* v. *Ullman*, 367 U. S. 497, 81 S. Ct. 1752 (1961), cited by defendant, with eighty years of inactivity on the part of state authorities in implementing the penal statute[5] which the plaintiff had exhumed and proffered to the court so that its invalidity might be declared and theoretical menace to plaintiffs abated. As basis for its rejection of plaintiff's plea for relief four justices of the court in *Poe* joined in the observation that the fact that the state "has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication." 367 U. S. at p. 508. The fifth justice whose concurrence was in the judgment alone does not in his brief memorandum evince a precise agreement with the language quoted.

The thrust of *Poe's* plurality opinion is in effect that whatever private conduct the several plaintiffs originally contemplated taking was in no realistic sense inhibited by the existence of a statute which by "tacit agreement" the Connecticut prosecutors had undertaken not to enforce. The court in a collateral threat of such tenuity could find no significant deprivation by the state of life and liberty without due process of law.

It is otherwise where claims of abridgment of First Amendment freedoms to speak and publish are in question.

The chill of a penal restraint on utterance blights those freedoms by its mere presence. "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *N.A.A.C.P.* v. *Button,* 371 U. S. 415, 433, 83 S. Ct. 328, 338 (1963). "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski* v. *Pfister,* 380 U. S. 479, 487, 85 S. Ct. 1116, 1121 (1965).

While reported prosecutions under § 781-b have been infrequent,[6] this is not necessarily the measure of the effectiveness of the statute to rein in dissent.

A brief review of § 781-b in its mutations as successive legislatures from time to time revisited and strengthened the provisions offers proof of the abiding faith of the law makers in its inhibitory force upon those whom it was intended to chasten. In its most recent form it survived, as Election Law § 457, a massive elision from the Penal Law of what was dead-letter and obsolete, and the effective date, a scant six months removed, betokens a censorial force that is far from spent.

As a penal neophyte (added by the L. 1941, c. 198, effective Sept. 1, 1941), the provision interdicted anonymity in respect of political literature which touched only the election of *public* officers and of candidates for nomination to *public* office.

Effective April 19, 1957, an amendment (L. 1957, c. 717), brought within its lengthening reach the humble post card, and broadened obligatory self-disclosure to sponsorship of matter relative to propositions and amendments of the State Constitution to be voted upon at general elections.

An amendment enacted in 1962 by chapter 576 effective September 1st of the same year generated the version of the law to which the complaint sub jud. is addressed. The scope of the provision was by such amendment widened so that it would thereafter encompass within its roster of

potential felons anonymous publishers and distributors, whereas earlier only printers and reproducers of what was circulated had been menaced. The circle of eligible beneficiaries of the statute as amended was, moreover, enormously expanded, for this was now to include *party* officials and candidates for *party* position as well.

Recodification of the 1966 Penal Law, earlier adverted to, brought in its wake redistribution of many special provisions found therein, and, not inappropriately, as part of these shiftings of locale, § 781-b was translated unchanged to its current situs in the Election Law.[7] The continuing vitality of legislative purpose is made manifest by such reenactment.

The attempt of defendant to moot the controversy and thus to abort a declaration of constitutional invalidity by citing the circumstance that the Congressman concerning whom the Zwickler handbill was published has since become a New York State Supreme Court Justice must fail. When this action was initiated the controversy was genuine, substantial and immediate, even though the date of the election to which the literature was pertinent had already passed. Zwickler had been arrested as he stood in a public street the week before the election, distributing handbills.[8] Their content was germane to the current political campaign. His had been a "citizen's arrest" made by an attorney-member of a political club located a scant 150 feet distant from where Zwickler had stationed himself to make such distribution. The Congressman-candidate was the district leader,—the office is an elective party position—, of this club. The attorney was a precinct captain of that club. He testified to the incident as follows:

He had asked Zwickler

> "[w]ho gave you the authority to hand out, who printed this literature, who is the name of the sponsor?" He said, 'none of your business.'"

• • •

> "I said, well you know, you are violating the law. He said, if I am violating the law why'nt you have me arrested, so I said, well, I asked Mr. Levine to go and get an officer and asked the officer to make this civil arrest. They called the police station. The lieutenant and the sergeant came down with a police car and finally he consented to go into the police car and we went down to the police station and I made this arrest. When I came down there I said if he gives me his name and address and who sponsored this literature I will not make the complaint and he refused to do that and the lieutenant had no other alternative but to book him on this charge."

The charge was prosecuted on behalf of the state by an *Assistant District Attorney* of the county. Although the "offense" was committed on October 29, 1964, the case was not tried until December 11, 1964, weeks after the general election had been held. More weeks elapsed before, on February 10, 1965, Zwickler was adjudged guilty and sentenced. The punishment meted out by the court was 30 days imprisonment in the Workhouse. Sentence was suspended but its menace hung over him. For a like offense subsequently committed § 782 admonished him that he would be indictable on a felony charge.

In the appeal to the Appellate Term of the Supreme Court which followed, the state as respondent continued to be represented by the District Attorney. That court on April 23, 1965, reversed and dismissed, but explicitly failed to reach the question of constitutionality (see supra p. 3 and footnote appended). The prosecutor yet gave no hint of any abating of zeal. Further appellate consideration was not automatic, but was premised on leave being granted by a judge of the State Court of Appeals. Permission was applied for and obtained.

It was not until December 1, 1965, that the Court of Appeals by its affirmance, rendered without opinion and, hence, without reaching the constitutional question, upheld

the action of the Appellate Term. Until it had done so, Zwickler would have been foolhardy indeed had he chosen to circulate political literature for the 1965 elections without certifying its provenance as § 781-b enjoined. Commission of a second and similar offense would, in the event the Court of Appeals restored the original judgment of conviction, have confronted Zwickler with the very real possibility that the trial judge would reinstate the 30 day sentence of imprisonment which he had suspended, and might have drawn a felony indictment as well.

The consequences thus evoked were too dangerous for Zwickler to ignore. He chose, as a prudent alternative to the martyrdom that he might have embraced, to file his current complaint in this court. The suit was begun with reasonable promptitude on April 22, 1966, less than five months after the Court of Appeals' inconclusive affirmance. It is seen, therefore, that no dilatoriness on his part has prolonged the chill of his first conviction. Indeed, our own abstention after he brought the action has markedly protracted his period of uncertainty.

Zwickler's complaint, quite properly, instances this seminal episode of harassment as illustrative of the impact upon him of an overbroad statute and as giving substance and immediacy to the threat of future inhibitory action which justify his demand for a declaration of invalidity. The fortuitous circumstance that the candidate in relation to whose bid for office the anonymous handbill was circulated had, while vindication inched tediously forward, removed himself from the role of target of the 1964 handbill does not moot the plaintiff's further and far broader right to a general adjudication of unconstitutionality his complaint prays for. We see no reason to question Zwickler's assertion that the challenged statute currently impinges upon his freedom of speech by deterring him from again distributing anonymous handbills. His own interest as well as that of others who would with like anonymity practise free speech in a political environment persuade us to the justice of his plea.

Evers v. *Dwyer,* 358 U. S. 202, 79 S. Ct. 178 (1958), provides the rubric for our holding and a gloss upon it. In *Evers* the Supreme Court considered, and held appropriate for its determination, the claim of a Negro resident of Memphis, Tennessee, that he was entitled to a judicial declaration in his own behalf and for others similarly situated that he was authorized in the exercise of a constitutional right to travel on a bus without being subjected under state law to segregated seating arrangements because of race. He had boarded the bus on only a single occasion, admittedly to test that right, and had left the bus when threatened with arrest for essaying to exercise it.

Despite the inchoate nature of his experience the court accepted jurisdiction and struck down the provision as invidious. The standard *Evers* articulates is not, however, to be limited to the particular rights it vindicates. With a broader reach and by necessary logic it draws beneath its protective canopy the grievances of those who are subjected by statute to special disabilities in the exercise of First Amendment freedoms as well. The aborting of the incident which was cited as illustrating the invasion of the right in *Evers* did not abate the "actual controversy." This was held to be substantial and persistent until it should be resolved by the declaration solicited by petitioner. So long as the right remained unvindicated, he preserved "a substantial, immediate and real interest in the validity of the statute which imposes the disability" and was entitled to have that right adjudged. 358 U. S. at p. 204, citing *Gayle* v. *Browder,* 352 U. S. 903, 77 S. Ct. 145 (1956).

The underlying controversy does not cease to serve as a predicate for such judicial declaration notwithstanding that the plaintiff halts his challenge short of arrest, as in *Evers,* nor of a second arrest as in the case of Zwickler. "We do not believe that appellant, in order to demonstrate the existence of an 'actual controversy' over the validity of the statute here challenged," the *Evers* opinion reads (p. 204), "was bound to continue to ride the Memphis

buses at the risk of arrest if he refused to seat himself in the space in such vehicles assigned to colored passengers."

The declaratory judgment action is designed precisely to give one, potentially a defendant in a criminal prosecution, access to a judicial determination prior to actual arrest when the facts indicate a sufficient basis for his belief that conduct he deems protected under the First Amendment will subject him to such prosecution.

Reaching, accordingly, the plaintiff's challenge to the constitutionality of § 781-b, we turn to a consideration of his contention that the statute is impermissibly "overbroad" in that it imposes its obligations and sanctions indiscriminately upon those whose writings politically circulated fall within the protection of the First Amendment and those who, by the criminal content of their text, have placed themselves outside the pale of such protection. The supplemental brief defendant now submits concedes that the statute does indeed make no distinction between the two groups.[9] Thereby the Attorney General yields as no longer tenable the position he earlier maintained at the hearing before us that the overbroad statute could be reduced to a constitutional dimension by reading into it attenuating decisions of the state courts yet to be rendered. By such judicial snipping and cropping the state's attorney hoped ultimately so to circumscribe the statute's intent that only such political literature as was criminally libelous would be brought under constraint to disclose sponsorship. For those who were appropriately discreet in their political criticism, or, for that matter, in according praise and approval, the statute in express terms being operative as to both pro and con, anonymity would be lawful and go unwhipped. Thus the requisite narrowing of the statute to satisfy First Amendment proscriptions would, hopefully, be achieved.

The legislative and judicial syllogism which led the Attorney General to propose such argument initially, and

now compels him to abandon it in favor of his current thesis that anonymity alone suffices in a political context to delineate the misdemeanor-felony irrespective of the truth or falsity of what is circulated, is clear, but at the same time provides its own refutation. Central to defendant's dilemma is *Talley* v. *California,* 362 U. S. 60, 80 S. Ct. 536 (1960), the force of which cannot be limited to the answer the court gave to the factual question posed to it, namely, "whether the provisions of a Los Angeles City ordinance restricting the distribution of handbills abridge[s] the freedom of speech and press secured against state invasion by the Fourteenth Amendment of the Constitution."

The city's counsel had urged as underpinning constitutionality that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet," the court rejoined, "the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose." The opinion is, however, quick to disclaim any implication that an ordinance thus conceived and focussed would survive the constitutional challenge if made. The opinion continues (362 U. S. at p. 64):

> "[W]e do not pass on the validity of an ordinance limited to prevent these or any other supposed evils. This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires.
>
> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Lovell v. City of Griffin, 303 U. S. at page 452, 58 S. Ct. at page 669."[10]

Two years after it was decided the courts of New York State were themselves to read the *Talley* teachings in such expansive sense. In *People* v. *Mishkin,* 17 A. D. 2d 243 (1st Dept. 1962), aff'd without opinion, 15 N. Y. 2d 671 (1964), section 330, subd. 2 of the state's General Business Law came under their consideration. The provision as then in force required that *every* publication other than newspapers and magazines should "conspicuously have imprinted * * * the true name and address of the publisher or printer."

The Appellate Division in a brief memorandum which affirmed a finding of Mishkin's guilt under counts not here pertinent charging violation of an obscenity statute voided his conviction as to other counts filed under the General Business Law. The court grounded the reversal on a determination that § 330 subd. 2 was unconstitutional under constraint of *Talley.* The *Mishkin* memorandum contained an obiter which the legislature, as noted shortly, later construed as a guide for an amendment which by mitigating the force of the original provision placed it, hopefully, beyond the strictures of the Talley teachings. The Appellate Division's comment read:

> "The District Attorney suggests that the statute may be found constitutional if its application is limited to obscene publications for there would be a purpose in facilitating the discovery of the publisher. But the statute itself is not so limited, and there is nothing to indicate that this was the legislative purpose. We do not reach the question whether such a purpose would validate the statute."

Taking the negative expression in the final sentence of the Mishkin dictum quoted above as an affirmation of its converse, which it assuredly was not, the legislature proceeded to amend the second subdivision of § 330 so that its mandate and the sanctions for violation were thereafter to be operative upon only such writings as were

"composed or illustrated as a whole [so] as to be devoted to the description or portrayal of bondage, sadism, masochism or other sexual perversion or to the exploitation of sex or nudity." These writings, but not those free of the taint described, were under the statute required to set forth at the end of the published matter the name and address of the publisher or printer.

Whether the Mishkin-prompted amendment, upon the validity of which the courts of the state do not appear as yet to have ruled, will be able to withstand further *Talley* oriented attacks does not here concern us, for § 781-b, the provision we review, has been subjected to no such narrowing. The legislature has not amended it, nor has any court interpreted it in such fashion that anonymity is to be penalized only as to hardcore foulness which the First Amendment will not protect.

Defendant's problem has, indeed, been compounded by a negative legislative action. For the same recodification of the Penal Law, effective September 1, 1967, which transferred § 781-b to the Election Law, therein to be renumbered § 457, has through omission repealed without comment the ancient provisions which theretofore constituted and delineated the crime of libel.[11] One may now, therefore, in the State of New York with a curious impunity, save for exposure to a claim for civil damages, circulate an anonymous tract which falsely charges a clergyman with adultery, but one dare not in an anonymous handbill truthfully publicize the sale of elective office lest he be held to answer criminally.

Anonymity alone, according to defendant, is the touchstone of the offense, but only if perpetrated in a political environment. Government assistance to a public figure, however, in ferreting out a "traducer" whom he may the more readily identify and from whom he may seek civil damages as balm for his individual smart at criticism of his official performance weighs in the balance as too high a toll to be exacted from First Amendment freedom of

expression for all. The freedom to animadvert upon public figures and affairs primes all others.

Nor does it avail defendant to urge upon us that § 781-b "protects the integrity of the electoral process * * * by facilitating the enforcement of various anti-corruption provisions in Election Law."[12]

The provisions of that law which the brief brings forward as the strongest it can muster in justification of this undercutting of the First Amendment focus on matters unrelated to the "protected liberties", and, so to speak, tangentially abrade them. Sections 320 through 328, the first of those cited by the Attorney General, comprise Article 13 of the Election Law, which is captioned "Campaign Receipts, Expenditures and Contributions". They contain directions for the filing at specified intervals by political committees, candidates and other persons of relevant statements.

The other sections tendered as support were transferred from their original home in the Penal Law under the revision effective September 1, 1967, and now are incorporated in Article 16, a new division of the Election Law, entitled "Violations of the Elective Franchise." Nothing in their content indicates a direct legislative purpose that implementation of these administrative regulations touching the exercise of the elective franchise shall diminish or erode the major First Amendment right to speak freely in political matters. Of these provisions § 447 denounces and penalizes political assessments on public employees; § 454 forbids candidates for judicial office, and § 460, corporations, to make political contributions.

It is true—if one were to follow defendant's reasoning—that were every colporteur constrained by statute to disclose whose money it was that paid the printer of the tract he hawks, the information thus extruded might in some instances blaze a trial to a criminal source or misuse of funds. A constitutional right of those privileged to speak with anonymity unbreached, however, may not be

disregarded to facilitate the prosecution of others who by their offending may have forfeited that right.

The current attitude of the Courts is to place the emphasis on the protection and preservation of the freedom of the many to advocate conduct or to reprehend misconduct in public affairs, not to redress the wrongs, real or fancied, of the individual office holder or aspirant, for what is uttered concerning his past or prospective management of those affairs.

"[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct". *The New York Times Co.* v. *Sullivan*, 376 U. S. 254, 273, 84 S. Ct. 710, 722 (1964). Indeed with libel no longer a crime, the civil claim asserted in a political context is well-nigh moribund, surviving only when the officer whose official conduct is aspersed can demonstrate an actual malice in the false speaking (id. p. 283). But the threat which chills free expression remains: "the fear of damage awards * * * may be markedly more inhibiting than the fear of prosecution under a criminal statute". (id. p. 277, citing City of Chicago v. Tribune Co., 307 Ill. 595, 607, 139 N. E. 86, 90 (1923)).

The more efficient administration of the ancillary procedures which concern the Attorney General must give room to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." (id. p. 270, citing Terminiello v. Chicago, 337 U. S. 1, 4, 69 S. Ct. 894 and DeJonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255).[13]

Talley declares (p. 539) that the Los Angeles ordinance which it invalidated "like the Griffin, Georgia[14] ordinance, is *void on its face*". (Emphasis supplied.) The Los Angeles provision banned distribution of handbills which did not identify their source. Registration of the distributor with the municipality, however, was not commanded. The *Griffin* ordinance, on the other hand, while stipulating

that a license be obtained before the printed matter was disseminated, did not outlaw anonymity of the sponsor.[15] *Talley's* reading of *Griffin* was that the Court in *Griffin* had similarly "held *void on its face* an ordinance that comprehensively forbade any distribution of literature at any time or place in Griffin, Georgia, without a license." (p. 537) (Emphasis supplied.)

Talley thus assimilates, as equally invalid on their face, provisions which merely bar anonymity and those which require licensing of matter which is constitutionally protected.

Talley cites *Bates* v. *City of Little Rock*, 361 U. S. 516, 80 S. Ct. 412 (1960), and *N.A.A.C.P.* v. *State of Alabama*, 357 U. S. 449, 78 S. Ct. 1163 (1958), by contrast as illustrative of invalidity, not on the face of a statute, but as generated by the *application* of the statute. Recognizing that the statute was enacted within a field of legislative competence, the Court nevertheless ruled it must be stricken as cutting too deeply into the favored First Amendment enclave. The *Talley* opinion brackets its citation of *Bates* and *N.A.A.C.P.* with a comment which marks the "void-on-face" as a distinct category from that of the "void by reason of application". Such comment reads:

> "We have recently had occasion to hold in [these] two cases that there are *times* and *circumstances* when States may not compel members of groups engaged in dissemination of ideas to be publicly identified. [citing *Bates* and *N.A.A.C.P.*]. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." (Emphasis supplied.)

In *Bates* the government had demanded the membership lists of the *N.A.A.C.P.* in ostensible aid of its power as a municipality to tax a business within its corporate limits. The Court, recognizing the taxing power as basic to the

ultimate purpose and function of government, nevertheless, found the legislative action so "significantly to impinge upon constitutionally protected freedom [that] it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." In the companion *N.A.A.C.P.* case the Association successfully resisted a governmental demand that it open up for judicial visitation the corporate roster of its members and contributors.

The Attorney General's argument here that a sufficient justification may be found for overriding First Amendment freedoms in the benefit that would accrue to the authorities charged with the duty of investigating corrupt practices in election campaigns receives an answer in the *N.A.A.C.P.* case at page 461, the opinion at that point reading:

> "Similar recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to suppress speech. United States v. Rumely, 345 U. S. 41, 46-47, 73 S. Ct. 543, 546, 97 L. Ed. 770; United States v. Harriss, 347 U. S. 612, 625-626, 74 S. Ct. 808, 815-816, 98 L. Ed. 989. The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. Grosjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660; Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 891, 87 L. Ed. 1292."

Harriss, cited by defendant,[16] and the companion *Rumely* case are noted in the foregoing excerpt only to stress the

limited authority of a state to intrude upon First Amendment freedom of utterance. The cases are seen to concern special situations in which within a narrowly limited area encroachment upon First Amendment anonymity is tolerated so that an exigent national interest may be safeguarded. Beyond the bounds delineated, encroachment confronts an insurmountable bar in that Amendment. And it is in this outer precinct of freedom that § 781-b assumes, and, hence, impermissibly to function.

In *Rumely,* respondent, an officer of an organization engaged in the sale of books of a "particular tendentiousness", had refused to disclose to a "House Select Committee on Lobbying Activities" the names of those who made bulk purchases of his books for further distribution. To the Committee the lower house had delegated the task of investigating "all lobbying activities intended to influence, encourage, promote, or retard legislation." The extent of "the controlling charter of the committee's powers" came into consideration by the Court in its review of Rumely's conviction for his alleged contempt in the context outlined. Specifically, the terms "lobbying" and "lobbying activities", undefined in the Act, were, according to the Court, necessarily to be delimited to avoid "serious constitutional questions."

"Surely it cannot be denied", the Court's opinion observes, "that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment." 345 U. S. 41, 46, 73 S. Ct. 543, 546 (1953).

Those doubts the Supreme Court laid to rest by adopting the restrictive meaning the Court of Appeals had ascribed to the enactment, namely that it was to be held applicable only to "representations made directly to the

Congress, its members or committees." If "lobbying" as the term is used in the resolution were to be interpreted as compassing "attempts 'to saturate the thinking of the community' " and "to cover all activities of anyone intending to influence, encourage, promote or retard legislation" the constitutional infirmity sought to be avoided would arise.

The *Harriss* case concerned a related juridical area, that of violation of the Federal Lobbying Act (60 Stat. 812, 839; 2 U.S.C. §§ 201-270). It instances a parallel judicial pruning designed to bring a disclosure statute too diffusive in its scope within constitutional bounds. Read literally, the registration requirements of the Act were broadly imposed upon all persons whose activities were purposed "[t]o influence, directly or indirectly, the passage or defeat of any legislation by the Congress." As in *Rumely* the *Harriss* opinion held (p. 623) that "the intended method of accomplishing this purpose must have been through direct communication with members of Congress", and that the reach of the Act as thus foreshortened does not in its other provisions "violate the freedoms guaranteed by the First Amendment—freedom to speak, publish, and petition the Government." (id. p. 625).

The lobbyist may, accordingly, in an anonymity constitutionally protected, purvey his wares without penalty or restraint when his approach is to others than members of Congress.

American Communications Ass'n v. *Douds*, 339 U. S. 382, 70 S. Ct. 674 (1950), another case relied upon by defendant, concerns itself with the problem of Communist infiltration of the labor movement. This the Court found to present a danger to freedoms of speech, press and assembly so significant that these freedoms could in its view be preserved only if constitutional government itself were to survive. Protection against unlawful conduct and incitement to commit unlawful acts were held to constitute a vital national interest for survival. The safeguarding

of that interest, accordingly, justified as constitutionally permissible so much of the Labor Management Relations Act, 1947, 29 U.S.C. § 159(h) as conditioned recognition of a labor organization on the filing of affidavits by its officers that they did not belong to the Communist Party nor believe in the overthrow of the government by force.

> "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech," so reads the opinion of the Court (p. 399)—"the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. The high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end indicates the solicitude with which we must view any assertion of personal freedoms. We must recognize, moreover, that regulation of 'conduct' has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas. We have been reminded that 'It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control.' "

Here the conduct which the legislature reprehends and undertakes to regulate by § 781-b is, without demarcation of the boundary between the two groups, the conduct of those who are in no sense culpable and that of those who are, or at least may be held so. No "vital national interest" cries out for protection through truncation of First Amendment rights when all the threat comes from a citizen's standing at a subway exit and peddling his tracts, be they religious, political, or whatever and sundry. Nor may freedom of utterance be stifled, though the street

be littered by the rain of discarded handbills. Neither the distributors, nor the distribution, but only the litterer may be proceeded against for violation of the Sanitary Code. (Schneider v. State, 308 U. S. 147, 60 S. Ct. 146 (1939). Cf. Wolin v. Port of New York Authority, 2d Cir., decided March 1, 1968.) "[R]egulation of 'conduct' has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas," *American Communications Ass'n* v. *Douds,* supra, 339 U. S. at page 399, admonishes us.

The tide of judicial thinking floods too strongly today in the estuary of First Amendment freedom for any tributary of government power in its exercise to overbear it.

Thus we see the Supreme Court when it revisited the troublesome Subversive Activities Control Act in 1967, in *United States* v. *Robel,* 389 U. S. 258, 88 S. Ct. 419 (1967), with a broad stroke sweeping into the discard a major fraction of that Act. It was an unconstitutional proscription of the First Amendment right of association, the Court held, for a statute, overboard in its abridgment of such right, to make it unlawful for a member of a Communist-action organization to engage in any employment in any defense facility. The statute, the Court declared, could not without substantial rewriting of its clear and precise provisions be narrowed to a constitutional scope. The statute "contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights." [Citing cases.] In summation, "when legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms." (Citing cases.)

Lamont v. *Postmaster General of United States,* 381 U. S. 301, 85 S. Ct. 1493, decided in 1965, marches abreast with *Robel* and *Griswold* in rejecting earlier views[11] of the Court in this area. *Lamont* struck down a federal statute

which required the department to detain and destroy unsealed mail from foreign countries determined to be communist political propaganda unless the addressee had returned a reply card sent him by the postal authorities indicating his desire to receive such piece of mail. The Court, resting its determination "on the narrow ground that [inasmuch as] the addressee in order to receive his mail must request in writing that it be delivered" ruled that the requirement amounted "to an unconstitutional abridgment of the addressee's First Amendment rights." The "affirmative obligation" to act in order to have mail released to the addressee "is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. * * * [A]ny addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.' The regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment. *New York Times* v. *Sullivan*, 376 U. S. 254, 270."

The case of *Mills* v. *State of Alabama*, 384 U. S. 214, 86 S. Ct. 1434 (1966), matches these others in providing a bench mark for the cresting flood. In *Mills* it appeared the legislature had assumed to promulgate a rule of "fair play" in the solicitation of votes by barring electioneering on the day the election was to be held. To hold that a newspaper editor who was charged with having wielded his pen on the forbidden day thereby rendered himself amenable to the sanctions of the statute, the State Supreme Court found itself forced to construe the provision as a valid exercise of the State's police power. The press "restriction, everything considered, is within the field of reasonableness," and "not an unreasonable limitation upon free speech." 278 Ala. 188, 195, 196, 176 So. 2d 884, 890.

The Supreme Court's views were briefly expressed and vigorously to the contrary. "Whatever differences may exist about interpretations of the First Amendment", it generalized, "there is practically universal agreement that a major purpose of that Amendment was to protect the

free discussion of governmental affairs." And specifically: "It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press."

It brushed aside as of no moment the state court's apology that the statute was

> "a salutary legislative enactment that protects the public from confusive last-minute charges and counter-charges and the distribution of propaganda in an effort to influence voters on an election day; when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over."

No "test of reasonableness" serves to save the "state law from invalidation as a violation of the First Amendment."

Penal Law § 781-b, and its successor, Election Law § 457, are, accordingly, adjudged invalid as an abridgement of rights secured by the First Amendment, and injunctive relief to implement such declaration of invalidity is decreed.

For reasons which appear from the foregoing and for want, in any event, of materiality in what the Attorney General, as movant, seeks leave to submit, his application that he be permitted to file a supplemental affidavit and the exhibit he annexes thereto is denied. The record on appeal to the state Court of Appeals on Zwickler's conviction is already before us.

Settle order on ten days' notice returnable on or before the 24 day of May, 1968.

IRVING R. KAUFMAN,
Circuit Judge.

JOSEPH C. ZAVATT,
Chief Judge.

GEORGE ROSLING,
District Judge.

FOOTNOTES

[1] 389 U. S. 241, 88 S. Ct. 391 (1967), reversing 261 F. Supp. 985 (E.D.N.Y. 1966).

[2] Penal Law § 781-b (now superseded in identical language by Election Law § 457, added L. 1965, c. 1031, § 43 eff. Sept. 1, 1967) reads:

> "No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.
>
> "The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal."

[3] Penal Law § 782 (repealed and simultaneously reenacted as Election Law § 458, similarly effective on September 1, 1967).

[4] "In our opinion, the People failed to establish that defendant distributed anonymous literature 'in quantity' in violation of the provisions of Section 781(b) [sic] of the Penal Law. We do not reach the question of the constitutionality of the statute involved". People v. Zwickler, Sup. Ct. App. Term, Kings Co., April 23, 1965 (unreported), as quoted in Zwickler v. Koota, 261 F. Supp. at 987.

[5] The laws whose constitutionality was challenged in Poe were "Connecticut statutes which, as authoritatively construed by the Connecticut Supreme Court of Errors, prohibit the use of contraceptive devices and the giving of medical advice in the use of such devices. In proceedings seeking declarations of law, not on review of convictions for violation of the statutes, that court has ruled that these statutes would be applicable in the case of married couples and even under claim that conception would constitute a serious threat to the health or life of the female spouse." 367 U. S. at p. 498. The Fourteenth Amendment alone was cited in the plurality opinion. First Amendment freedoms were not mentioned except in the dissents.

[6] In addition to the Zwickler prosecution there are reported People v. Clampitt, 34 Misc. 2d 766 (Ct. of Spec. Sessions 1961); and North End Democratic Club v. Attorney General, 31 Misc. 2d 1000 (Sup. Ct. Special Term, N. Y. County 1961).

[7] Section 69 of the New York State Executive Law confers upon the Attorney General of the State, a non-judicial elected official, invariably politically affiliated, and not immune on occasion to the gravitational pull of such affiliation, powers and duties respecting "crimes against the elective franchise." Among these are the power to investigate with authority to subpoena, to procure and execute warrants of arrest by appointees vested with the authority of peace officers, and to call upon members of the police, sheriffs and other public officers to assist him in carrying out the provisions of the section. This broad spectrum of power enables the Attorney General to act through local agencies when sympathetic, or directly, if local authority should prove uncooperative.

[8] Undisputed facts testified to before Criminal Court Judge Ryan as reported in New York Court of Appeals Record on Appeal. This document is before the Court without defendant's motion, which is accordingly unnecessary, for leave to file it as an exhibit.

[9] The footnote, defendant's brief p. 17, reads with underscoring of the original preserved:

> "Defendant does not contend, as plaintiff appears to suggest, that the statute's reach is *limited* to scurrilous or libelous literature. The statute, by its terms, does not attempt to assess the nature of the language published and does not promulgate any standards other than anonymity. The statute applies to all anonymous *campaign* literature. As will clearly appear, *infra* , the evil aimed at is anonymity and it is not the purpose of the statute to prevent *any* kind of utterance. The public is entitled to know the source of any campaign utterance. Plaintiff's contention, therefore, that the statute is 'overbroad' is wholly untenable."

[10] Justice Black, delivering the brief opinion in Talley, provides an eloquent historical note which adumbrates the path the Court has in the eight intervening years traversed and lights the way for its future libertarian course. The note reads, (id. pp. 64 and 65):

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes."

[11] The sections thus omitted from the revision of the Penal Law are with their descriptive headnotes the following: § 1340—Libel defined; § 1341, Libel a misdemeanor; § 1342, Malice presumed; defense to prosecution; § 1343, Publication defined; § 1344, Liability of editors and others; § 1345, Publishing a true report of public official proceedings; § 1346, Privileged communications; § 1348, Furnishing libelous information; § 1349, Furnishing false information.

Only Penal Law § 1347 is preserved, but, renumbered § 155.05(2), is transferred to Article 155, "Larceny," of the Revised Penal Law. In new associations it is with extensive paraphrase brigaded with offenses falling generally within the definition of extortion effected by speech or silence.

[12] The Attorney General adduces § 612 of 18 U.S.C. designed to "enforce other provisions of the Federal Corrupt Practices Act, 2 U.S.C. §§ 241-256", as furnishing by its mere existence a constitu-

tional prop for § 712-b, a provision of like import. The history he cites for the federal enactment is unhelpful. It consists of Attorney General Francis Biddle's brief letter dated April 7, 1944, addressed to the Chairman of the Committee on the Judiciary of the Senate, responsive to the Senator's request for the Justice Department's views concerning the bill. This he summarizes as one "to provide that no person shall publish or distribute any political statement relating to a candidate for election to any Federal office which does not contain the name of the person responsible for its publication or distribution."

Nothing without elaboration that the proposed law "would implement the Federal Corrupt Practices Act" and "tend to facilitate the enforcement of the provisions of that act, especially those which require reports of expenditures and contributions" and of the Hatch Act (then 18 U.S.C. § 61(m)) limitation of $5,000 on contributions in connection with Federal elections, Mr. Biddle's letter announced: "I find no objection to the enactment of the bill." The Senate report to which the letter is appended provides no history of its own, but rests its approval of the bill on the Biddle letter. The report prefaces the Attorney General's ex cathedra with the following uninformative comment: "The Department of Justice having considered the legislation reports an *analysis* in the following letter:" (S. Rep. No. 1390, 78th Cong. 2d Sess., 2 (1944).) (Emphasis added.)

As the Senate report says too little, so the report of the "President's Committee on Civil Rights, to Secure These Rights," pp. 51-53 (1947), an additional document cited indefinitely by defendant in this context, says too much. It propounds the thesis that "the volume and skill of modern propaganda make identification of the source of an argument essential to its evaluation." Decrying the circulation of "anonymous hate-mongering or other subversive literature" the extent of which it acknowledges it does not know, the Committee declares its belief that the "principle of disclosure is * * * the appropriate way to deal with those who would subvert our democracy by revolution or by encouraging disunity and destroying the civil rights of some groups."

Talley disagrees, and the Congress has, in the score of years that have passed since these views of the Committee were expressed, made no move to implement them.

[13] Cf. Garrison v. State of Louisiana, 379 U. S. 64, 85 S. Ct. 209 (1964), in which the Supreme Court extends the New York Times principle so as to bring down the Louisiana criminal libel statute upon parallel reasoning.

[14] Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666 (1938).

[15] The ordinance does not appear to have precluded the preservation of anonymity despite the licensing procedure it established. Application by an attorney or agent for an undisclosed principal for the license was a procedure not inconsistent with the intent of the indefinitely worded provision.

[16] The defendant's brief characterizes Harriss as presenting "the most analogous situation to that in the instant case."

[17] See Lewis Publishing Co. v. Morgan, 229 U. S. 288, 33 S. Ct. 867 (1912).

APPENDIX B

Jun 18 1968

66-Civ.-375

ORDER AND DECREE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

SANFORD ZWICKLER,

Plaintiff,

against

AARON E. KOOTA, as District Attorney of Kings County,

Defendant.

The plaintiff, having moved for a preliminary injunction in favor of plaintiff to enjoin enforcement of Section 781-b of the Penal Law of the State of New York (now Section 457 of the Election Law of the State of New York) on the ground the said law is unconstitutional, and for the convening of a statutory three-judge court to hear said application, and the defendant having moved for an order dismissing the complaint, and the motion for the convening of a statutory three-judge court having been granted by the Hon. George Rosling, United States District Judge, and the said court consisting of the Hon. Irving Kaufman, Circuit Judge of the United States for the Second Circuit, the Hon. Joseph C. Zavatt, Chief Judge of the United States District Court for the Eastern District of New York and the Hon. George Rosling, United States District Judge

for the Eastern District of New York, having been convened on June 9, 1966, and the said application having been heard on said date and the said court having filed its opinion on September 19, 1966, in favor of the defendant, Judge Rosling dissenting, and the plaintiff having appealed to the Supreme Court of the United States from the order of this court dated September 29, 1966, which dismissed the complaint, and the Supreme Court having reversed the order on December 5, 1967, and remanded the action for disposition by this court, and this court having reconvened for consideration of the briefs of the parties without holding further oral argument and the parties having stipulated at the hearing on June 9, 1966, that the court treat plaintiff's motion as one for final judgment, and the court having rendered its written decision dated May 6, 1968, holding that the case presents a justiciable controversy and is not moot, and declaring said statute to be invalid as abridging plaintiff's rights under the First Amendment to the Constitution of the United States, and that plaintiff is entitled to a decree to that effect, together with injunctive relief, it is

ORDERED, ADJUDGED AND DECREED, that the defendant's motion to dismiss the amended complaint be and the same hereby is denied; and it is further

ORDERED, ADJUDGED AND DECREED, that Section 457 of the Election Law of the State of New York, is invalid as repugnant to the Constitution of the United States in that it abridges the rights secured to the plaintiff under the First Amendment to the Constitution of the United States; and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant, Aaron E. Koota, his agents and employees, are hereby enjoined from arresting or prosecuting plaintiff under said statute; and it is further

ORDERED, that the defendant's application to file a supplemental affidavit together with the exhibit annexed thereto is hereby denied; and it is further

ORDERED AND ADJUDGED, that the plaintiff, Sanford Zwickler, of 7314 21st Avenue, Brooklyn, New York, do recover of the defendant, Aaron E. Koota, as District Attorney of Kings County, Municipal Building, Brooklyn, New York, the sum of $44.36 costs as taxed.

ORDERED, that this Order and Judgment be and the same are hereby stayed to and including July 8, 1968, in order to permit the defendant, if he so chooses, to appeal therefrom and to apply for a further stay to the Supreme Court or a Justice thereof.

Dated: June 18, 1968.

IRVING R. KAUFMAN,
Circuit Judge.

JOSEPH C. ZAVATT,
Chief Judge.

GEORGE ROSLING,
District Judge.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 370

ELLIOTT GOLDEN, as Acting District Attorney of the County of Kings,

Appellant,

against

SANFORD ZWICKLER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

This is an appeal from a judgment and order of a three-judge court of the United States District Court for the Eastern District of New York, entered on June 18, 1968, declaring § 457 of the New York State Election Law to be unconstitutional and enjoining the appellant from enforcing the statute (A. 59-60). The statute prohibits the distribution in quantity of anonymous campaign literature (A. 30). Appellee's motion for a three-judge district court was granted on May 20, 1966 (A. 23). That court's dismissal of the complaint is dated September 29, 1966. This Court reversed that order on December 5, 1967. *Zwickler* v. *Koota,* 389 U. S. 241. At the request of the District Court additional briefs were then filed without any further

argument. On May 6, 1968 the District Court rendered its decision. The order was entered on June 18, 1968 (A. 58-60). On July 8, 1968, Mr. Justice Harlan stayed the order of the District Court provided the appeal was docketed by August 5, 1968 (A. 62). This order was complied with and probable jurisdiction was noted on October 14, 1968 (A. 64).

Opinions Below

The opinion granting the motion to convene a three-judge court (A. 18-21) is not reported. The opinion of the three-judge court is not yet reported (A. 29-57).

Jurisdiction

The order of the District Court was entered on June 18, 1968 (A. 58-60). The notice of appeal was filed on July 3, 1968 (A. 4). Probable jurisdiction was noted on October 14, 1968 (A. 64).

The jurisdiction of this Court rests on 28 U.S.C. § 1253.

Statute Involved

New York Election Law, § 457 (formerly New York Penal Law, § 781-b):

> "§ 457. Printing or other reproduction of certain political literature. No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political

party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal. [Chap. 1031, L. 1965, eff. Sept. 1, 1967. Subject matter formerly contained in Sec. 781-b, Penal Law.]''

Questions Presented

1. Does New York Election Law § 457 prohibiting the distribution in quantity of anonymous campaign literature during an election campaign abridge freedom of expression so as to constitute a violation of the United States Constitution?

2. Did the instant case present a case of controversy within the meaning of Article III of the United States Constitution warranting the granting of declaratory relief?

3. Was the granting of injunctive relief proper in the instant case?

Statement of the Case

Appellee commenced this proceeding in the United States District Court for the Eastern District of New York in May, 1966, seeking declaratory and injunctive relief against the enforcement of New York Penal Law § 781-b* prohibiting the distribution in quantity of anonymous campaign literature (A. 7-12).

The complaint alleged that appellee desired and intended to distribute in quantities of more than a thousand copies anonymous political leaflets with regard to the election campaign of 1966 "and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966" (A. 9). It alleged that appellee wished to make such distribution of a leaflet "prepared by and at the instance of a person other than the plaintiff" (A. 9) because of his belief that the statute forbidding such distribution violates the First and Fourteenth Amendments to the Constitution "in that it is an infringement of the freedom of expression" (A. 9).

The complaint sought federal relief enjoining enforcement of the statute not because appellee was being subjected to harassment of any sort and not because any prosecution was pending or imminent but because "[t]he said leaflet is embraced within the scope and intendment of the statute" (A. 9), because the District Attorney "is a

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* Penal Law, § 781-b is now Election Law § 457 and will be referred to as such.

diligent and conscientious public officer and pursuant to his duties intends or will again prosecute the [appellee] . . . for his acts of distribution" (A. 9-10) and because, in 1964, appellee was charged with distributing an anonymous leaflet in connection with the Congressional election to be held on November 3, 1964, about four days after the date of distribution (A. 7-8). The leaflet called on then U. S. Representative Abraham Multer, now a State Supreme Court Justice, to explain why he had voted against cutting off aid to the United Arab Republic and had announced his preference for a watered down condemnation of religious bigotry over a denunciation of Soviet anti-semitism. Appellee was found guilty after a trial at which he presented no evidence. *People* v. *Zwickler* (Crim. Ct. N.Y.C. Kings Co. Feb. 10, 1965, unreported) (A. 8). The judgment of conviction was "unanimously reversed on the facts" upon the failure of the People "to establish that defendant distributed anonymous literature 'in quantity'." *People* v. *Zwickler* (Sup. Ct. App. Term, Kings Co. April 23, 1965, unreported) (A. 8). The reversal was affirmed without opinion by the New York Court of Appeals. *People* v. *Zwickler,* 16 N. Y. 2d 1069, 266 N.Y.S. 2d 140 (1965).

Other than the specific reference to Congressman Multer, the complaint alleged that the appellee:

> "desires and intends to distribute in the Borough of Brooklyn, County of Kings, New York . . . the anonymous leaflet herein described . . . and similar anoymous leaflets, all prepared by and at the instance of a person other than the plaintiff. The said distribution is intended to be made at any time during the election campaign of 1966 and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966." (A. 9).

By order dated May 20, 1966, the Hon. George Rosling of the United States District Court for the Eastern District of New York granted appellee's motion to convene a statutory three-judge court. The Court, consisting of the Hon. Irving R. Kaufman, Circuit Judge of the United States Court of Appeals for the Second Circuit, Hon. Joseph Zavatt, Chief Judge of the United States District Court for the Eastern District of New York and Hon. George Rosling, heard appellant's motion to dismiss the complaint and appellee's motions for injunctive and declaratory relief on June 9, 1966.

On September 19, 1966, the Court filed its opinion in favor of the appellant, Judge Rosling dissenting. The majority held that the Court should abstain from a decision on the merits of the application and dismissed the complaint. *Zwickler* v. *Koota,* 261 F. Supp. 985.

On December 5, 1967, this Court reversed the order and remanded the action for disposition by the District Court directing the Court to consider whether or not the complaint alleged a case or controversy or had become moot, whether declaratory judgment was a proper remedy in the instant case, whether the statute in question was repugnant to the United States Constitution, and whether, if it was, injunctive relief should be granted in addition to declaratory relief. *Zwickler* v. *Koota,* 389 U. S. 241.

On May 6, 1968, the District Court rendered its decision. After setting forth the provisions of the statute and the previous experience of appellee with the statute, the Court turned to the question of whether the facts presented a controversy of sufficient immediacy to support an action for declaratory judgment (A. 30). The Court first said that the statute was not one which had not been invoked by the State and, thus, held that it did not fall within *Poe* v. *Ullman,* 367 U. S. 497. Moreover, the Court held that in a case where First Amendment freedoms are in question "the chill of a penal restraint on utterance blights

those freedoms by its mere presence" (A. 32). The Court noted that the statute had been amended several times and had recently [1962] been moved from the Penal Law to the Election Law and its scope widened (A. 32-33).

The Court refused to consider that because Congressman Multer had become Supreme Court Justice the case was moot since "when this action was initiated the controversy was genuine, substantial and immediate, even though the date of the election to which the literature was pertinent had already passed" (A. 33).

The Court said that, rather than risk another arrest, appellee "chose, as a prudent alternative to the martyrdom that he might have embraced, to file his current complaint in this court" (A. 35). The Court regarded the elevation of Mr. Multer as a "fortuitous circumstance" (A. 36) and said that this did not moot "the plaintiff's further and far broader right to a general adjudication of unconstitutionality" (A. 36). Without taking any testimony, the Court concluded:

> "We see no reason to question Zwickler's assertion [at the outset of the action] that the challenged statute currently impinges upon his freedom of speech by deterring him from again distributing anonymous handbills. His own interest as well as that of others who would with like anonymity practice free speech in a political environment persuade us to the justice of his plea." (A. 36)

The Court relied on the decision of this Court in *Evers* v. *Dwyer*, 358 U. S. 202 (A. 36-37).

Having thus quickly and without proof or argument disposed of the preliminary questions referred to in this Court's remand, the Court moved on to consider the constitutionality of the statute. Imputing to the attorney for appellant a change in position, the Court noted that it was appellant's position that the statute was not concerned

with whether or not the content of the material to be distributed could be prosecuted criminally. The Court held that that position was untenable in light of the decision of this Court in *Talley* v. *California*, 362 U. S. 60 (A. 38-39). The Court strangely found support for its reading of *Talley* in the *New York* decision of *People* v. *Mishkin*, 17 A. D. 2d 243 (1st Dept. 1962), *aff'd* 15 N. Y. 2d 671, 204 N. E. 2d 209 (1964), in which the courts of New York struck down a statute requiring every publication other than newspapers and magazines to print the true name and address of the publisher or printer.

The Court felt that appellant's "problem has, indeed, been compounded by a negative legislative action" (A. 41). It referred to the repeal by New York of criminal libel sections and said that:

> "One may now, therefore, in the State of New York with a curious impunity, save for exposure to a claim for civil damages, circulate an anonymous tract which falsely charges a clergyman with adultery, but one dare not in an anonymous handbill truthfully publicize the sale of elective office lest he be held to answer criminally." (A. 41)

The opinion went on to say that although anonymity alone was forbidden:

> "Government assistance to a public figure, however, in ferreting out a 'traducer' whom he may the more readily identify and from whom he may seek civil damages as balm for his individual smart at criticism of his official performance weighs in the balance as too high a toll to be exacted from First Amendment freedom of expression for all." (A. 41)

The Court also rejected appellant's argument that the statute promoted enforcement of the anti-corruption provisions of the Election Law. It said simply that those

sections did not indicate a legislative purpose that their enforcement should infringe the First Amendment. The Court then acknowledged that the possibility of civil damages for criticism had greatly diminished but, nevertheless, remarked that "the threat which chills free expression remains, 'the fear of damage awards'" (A. 43).

The Court considered in this context the cases of *Bates* v. *City of Little Rock,* 361 U. S. 516 and *NAACP* v. *State of Alabama,* 357 U. S. 449, and characterized them as cases involving the invalidity of statutes as applied. The Court said that in contrast to *Talley,* those cases involved legitimate state purposes which were, nevertheless, not sufficiently aided by the statute in question to justify overriding the First Amendment (A. 44-45). The Court apparently held that, just as in the *NAACP* case the statute in question requiring disclosure bore no reasonable relationship to the taxing power, so in the instant case the statute could not be justified by the duty of compliance with corrupt practices statutes in election campaigns. The Court distinguished *United States* v. *Harriss,* 347 U. S. 612 and *United States* v. *Rumely,* 345 U. S. 41, as concerning "special situations in which within a narrowly limited area encroachment upon First Amendment anonymity is tolerated so that an exigent national interest may be safeguarded" (A. 46).

The Court ignored the existence of a substantially identical federal statute as that involved at bar (18 U.S.C. § 612) and a District Court opinion upholding that federal statute and distinguishing *Talley* (*United States* v. *Scott,* 195 F. Supp. 440). Instead, the Court simply said that no vital national interest required the legislation in question and discussed several recent cases purporting to uphold its conclusion. *United States* v. *Robel,* 389 U. S. 258; *Lamont* v. *Postmaster General of United States,* 381 U. S. 301; *Mills* v. *Alabama,* 384 U. S. 214 (A. 49-52).

Finally, the Court held that the statute was to be declared invalid and, without any discussion whatsoever,

stated that "injunctive relief to implement such declaration of invalidity is decreed" (A. 52), failing to pay any special attention to the language of this Court's opinion on remand regarding the demand for injunctive relief upon which appellee predicated his case.

The Court declined to accept appellant's offer of a supplemental affidavit and exhibit (A. 52).

Summary of Argument

Election Law § 457 is not an unreasonable restraint of free expression. It is not such a restraint at all and, indeed, promotes First Amendment considerations. Time and experience have forcefully taught that there is a substantial need for the legislation, and that the reasons for the statute are relevant and urgent. The legislation is no broader than the need it serves, and no prejudice can result from the required limited disclosure. The statute protects the integrity of the electoral process by facilitating the enforcement of various anti-corruption provisions in the New Yok Election Law requiring reports of campaign receipts and expenditures.

Moreover, in an election situation, where the public is being asked to take a definite course of action, it is entitled to know who is urging one position or another and what campaign tactics are being employed by each side. Time is of the essence in an election campaign. Not all charges and countercharges can be answered before the election but it is of indispensable importance to the electorate that it be able to evaluate for itself any statement made in the light of its source. The New York experience, as outlined in the report of the Special Committee on Campaign Practices, highlights the necessity for the legislation,

By limiting itself to the campaign context, the New York statute is unlike the broad disclosure statutes previously struck down by this Court. The limitation of the statute is demonstrated by the fact that none of the well-known

anonymous literature of the past referred to by appellee falls within its proscription. Furthermore, appellee has not demonstrated any realistic possibility of reprisal resulting from disclosure. As the District Court acknowledged, criminal libel no longer exists in New York as a penal offense. Civil libel and invasion of privacy suits by public officers are now limited in all but the most outrageous cases and there is an entire absence of any proof that disclosure would result in harassment of individuals for their associations or that disclosure is being sought by the statute for that purpose.

Substantially identical federal and state statutes have been upheld by the Courts in decisions demonstrating as above the lack of merit in the criticisms of the statute.

While the District Court erroneously ruled that the New York statute was invalid, and thus the merits are necessarily before this Court at this time, the case also raises the issue of whether any of these statutes may be challenged by any citizen simply because he is a citizen, which appears to be the only basis upon which the District Court entertained the suit. We contend that the District Court improperly held that the case presents a justiciable controversy within the meaning of Article III of the Constitution and the decisions of this Court. Mr. Multer, the only target of appellee's antagonism is now a Justice of the New York State Supreme Court and the election with respect to which the literature was distributed has long since passed. The Court was bound to consider the case in the final shape it had taken and if so considered the controversy had become moot. Appellee's bare assertion that he intends to distribute "similar anonymous leaflets in the future" is so unspecific as to provide no basis for jurisdiction and the mere fact that a First Amendment claim is advanced cannot substitute for the absence of allegations of fact.

The absence of judicial fitness of the controversy was not affected by the District's Court automatic grant of the injunction, the gravamen of the complaint. It was improper

to grant injunctive relief in the instant case without any proof and finding of any necessity to protect appellee's rights. Apart from this, this Court has long held that, even where a statute unconstitutionally infringing First Amendment rights is struck down, injunctive relief may not be granted without a showing of irreparable injury by undue harassment or other bad faith acts of the public officials involved.

POINT I

The statute enacted pursuant to the state's power to regulate the conduct of elections is a narrowly limited disclosure statute serving a necessary legitimate state purpose and does not constitute a restraint on freedom of expression. The First Amendment is aided rather than impeded by compliance with the statute.

New York's Election Law § 457, like the cognate federal statute (18 U.S.C. § 612), upheld in *United States* v. *Scott,* 195 F. Supp. 440 (D. No. Dak. 1961), and similar statutes of other states upheld in *Commonwealth* v. *Evans,* 156 Pa. Super. 321, 40 A. 2d 137; *Chronicle & Gazette Publishing Co., Inc.* v. *Attorney General,* —— N. H. ——, 48 A. 2d 478; *Canon* v. *Justice Court,* 39 Cal. Reptr. 228, 393 P. 2d 428 and *State* v. *Freeman,* 143 Kans. 315, 55 P. 2d 362, in no way regulates the content of speech. Such statutes have a long history of judicial and public acceptance.

The New York statute simply requires identity of the printer and sponsor to be stated thereon in the case of the distribution of campaign literature and there is no substantial basis to criticize this simple requirement as a restraint on freedom of expression. The District Court opinion labored to impute such a restraint despite the entire absence of any proof. Instead it appears to demonstrate in reality the verity of the position we have maintained in this litigation. In any event, even if *arguendo* some restraint were imputed, there is no occasion to balloon such

restraint into an unconstitutional invasion of the First Amendment.

A. New York Election Law § 457 promotes the purposes of the First Amendment and the duty of the State to protect the electoral process.

The statutes of New York and other states satisfy in every way the standards set out by this Court in its opinions: (a) legitimate state purpose and need (*Schneider* v. *State,* 308 U. S. 147, 161; *United States* v. *O'Brien,* 391 U. S. 367; *Pickering* v. *Board of Education,* 391 U. S. 563; *Konigsberg* v. *California,* 366 U. S. 36, 50-51); (b) substantial connection between the breadth of a disclosure demanded and the state's purpose (*Sherbert* v. *Verner,* 374 U. S. 398; *Shelton* v. *Tucker,* 364 U. S. 479, 489), and, finally, a corollary, (c) whether or not the statute involves an unnecessary restraint and whether disclosure might unduly prejudice those of whom it was required (*DeGregory* v. *Attorney General,* 383 U. S. 825, 828-29; *NAACP* v. *Alabama,* 357 U. S. 449).*

In applying these factors, this Court has consistently upheld limited disclosure statutes serving a strong governmental interest. *United States* v. *Harriss,* 347 U. S. 612; *Poulos* v. *New Hampshire,* 345 U. S. 395; *American Communications Association* v. *Douds,* 339 U. S. 382; *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288.

New York Election Law § 457 is narrowly limited in its application to anonymous campaign literature. It is not directed at all literature printed any time under any circumstances. *Talley* v. *California,* 362 U. S. 60; *Jamison* v. *Texas,* 318 U. S. 413; *Lovell* v. *Griffin,* 303 U. S. 444. It does not restrict the circulation of anonymous literature

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* To the extent that other theories have been advanced for the weighing of First Amendment claims, Election Law, Section 457 satisfies the requirements of those tests as well. See *e.g.,* EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (N. Y. 1966), pp. 104-105 and "The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil," 70 Yale L. J. 1084 (1961).

dealing with ideas or even with current issues. See *Canon* v. *Justice Court, supra,* 393 P. 2d at 431. It is limited solely to literature respecting candidates and propositions on the ballot. It requires only that the printer and author or sponsor be identified on literature circulated in quantity to influence the electorate in their choice.

The limited nature of the statute does no more than is required to promote the important and legitimate state purposes of insuring the purity of the electoral process (*Burroughs and Cannon* v. *United States,* 290 U. S. 534) and promoting the intelligent use of the ballot. *Katzenbach* v. *Morgan,* 384 U. S. 641; *Lassiter* v. *Northhampton County Board of Elections,* 360 U. S. 45. This dual purpose requires that the statute not concern itself with the content of the anonymous matter and reflects the finding that anonymity itself in an election context is inimical to the voting process. The statute is thus not overbroad. *Cf. Talley* v. *California, supra; Sherbert* v. *Verner, supra; Shelton* v. *Tucker, supra.* Indeed, the overriding urgency of the information sought by § 457 and similar statutes is substantially increased by the recent decisions of this Court emphasizing the importance of the citizen's right to vote. See, *e.g., Baker* v. *Carr,* 369 U. S. 186; *Harper* v. *Virginia State Board of Elections,* 383 U. S. 663; *South Carolina* v. *Katzenbach,* 383 U. S. 301; *Carrington* v. *Rash,* 380 U. S. 89; *Katzenbach* v. *Morgan, supra; Mills* v. *Alabama,* 384 U. S. 214.

As the California Court said in *Canon* v. *Justice Court, supra,* at 431:

> "It is clear that the integrity of elections, essential to the very preservation of a free society, is a matter 'in which the State may have a compelling regulatory concern.' "*

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* Appellant does not contend that the statute's reach is *limited* to scurrilous or libelous literature. The statute by its terms, does not promulgate any standard other than anonymity. It applies to all campaign literature and anonymity is its only target. It is not its purpose to prevent any kind of utterance.

The statute protects the integrity of the electoral process first by facilitating the enforcement of various anti-corruption provisions in the Election Law. These include, for example, New York Election Law §§ 320-328 with respect to requirements for filing reports on campaign receipts, expenditures and contributions, § 447 respecting political assessments, § 454 respecting contributions from judicial candidates and § 460 respecting campaign contributions from corporations. To the extent that these sections might be circumvented by the expenditure of funds on anonymous literature, § 457 operates to prevent such a possibility. In this respect it is very similar to the federal provision, 18 U.S.C. § 612, which also was enacted to enforce other provisions of the Federal Corrupt Practices Act. 2 U.S.C. §§ 241-256. See S. Rep. No. 1390, 78th Cong., 2nd Sess., 2 (1944); Letter from Francis Biddle, Attorney General to Chairman, Senate Judiciary Committee (April 7, 1944). § 612 was upheld in the *Scott* case, *supra* (195 F. Supp. 440).

The District Court rejected this concern as a reasonable basis for the statute simply by saying that the passage of anti-corruption provisions could not be read as intending to limit the First Amendment. This *a priori* statement merely substitutes a conclusion for analysis and neither obviates the fact that such legislation was required nor assesses the impact on First Amendment considerations of such a statute.

A still more important interest served is the right of the public to know the identity of those urging a certain course with respect to an election in order to be able to evaluate material in the light of its sources. This aspect of the statute not only does not violate the purpose of the First Amendment but in fact promotes it. It is the same consideration behind the requirement of identification of those responsible for television and radio campaign material written into the Federal Communication Act (47 U.S.C. § 317(a); 47 C.F.R. § 73.654(f), (g)).

The "core value" of free speech is "the public interest in having free and unhindered debate on matters of public importance". *Pickering* v. *Board of Education, supra,* at 573. The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." *Associated Press* v. *United States,* 326 U. S. 1, 20. That legislation encouraging the dissemination of information promotes the aim of the First Amendment was stated by Mr. Justice Black in *Vierick* v. *United States,* 318 U. S. 236, 249 (dissenting opinion):

> "[It is a] fundamental constitutional principle that our people *adequately informed,* may be trusted to distinguish between the true and the false. . . ." (Emphasis supplied.)

The withholding of the source of information is certainly inimical to its broadest possible dissemination. Indeed, anonymity and the right of the people to know have been described as antagonistic values. "The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil," 70 Yale L. J. 1084 (1961). In the context of this case, however, disclosure is the relevant value. Indeed, in the instant case, no evidence was adduced that the statute restrains freedom of expression at all. Certainly, it does not do so on its face. It does not attempt to prescribe in any manner the content of speech. See *United States* v. *O'Brien, supra.* Nor does it require registration. *Cf. Thomas* v. *Collins,* 323 U. S. 516; *Cantwell* v. *Connecticut,* 310 U. S. 296.

The requirement of disclosure of information as a protection for the public is a well recognized legislative tool. The most sweeping disclosure requirements are found in the commercial context where virtually no product can be marketed without disclosing the manufacturer of the product and its contents and where securities cannot be sold without the most detailed information being provided. See *e.g.,* 15 U.S.C. §§ 46; 52-55; 68a-c; 69a-c; 70a-c; 77aa, 77g, 77j,

77*lll*, 77xxx, 781, 78m, 78o, 78q, 78r, 79f, 79g, 79o, 80a (8, 24, 25, 29, 32), 80b (3, 4, 7), 21 U.S.C. *passim*. See also "Freedom of Expression in a Commercial Context" 78 Harv. L. Rev. 1191, 1206-1207 (1965). This court has approved the disclosure requirements involved in the federal regulation of lobbying; 2 U.S.C. §§ 261-70. *United States* v. *Harriss*, 347 U. S. 612; the requirements of the Federal Corrupt Practices Act; 2 U.S.C. §§ 241-45; *Burroughs and Cannon* v. *United States*, 290 U. S. 534; and the disclosure required for the second class mailing privilege; 39 U.S.C. § 4369; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288. Indeed, in *dicta*, this Court has approved the disclosure requirements of 18 U.S.C. § 612, which is similar to the statute in issue here. *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U. S. 1, 97. Surely the right of the public to know who is urging it to buy a product is no more important than its right to know who is urging it to elect a candidate.

The right of the public to know the sources of information is especially compelling in the modern era of mass communications:

> "As the marketplace changed from quill and parchment to printing press, camera and vacuum tube, the testing of truth increasingly required disclosure of the writer and of the source of financial support of the media of communication. The historic anonymity of the author is not to be analogized with the anonymity of dissemination of ideas in the vast quantities presently possible. Perhaps in more leisurly times the theory that ideas might be evaluated by themselves was a practicable one. In these hectic days when the facts upon which action must be based are numerous, and in many cases, understandable only by experts, the busy citizen has neither the time nor the faculties to analyze each idea presented to him and must, therefore, depend upon the status and reputation of those

who espouse it". Ernest and Katz "Speech: Public and Private", 53 Col. L. Rev. 620, 623 (1953).

B. There is a compelling need for the statute in an election context.

The importance of being able to identify the source of material is particularly urgent in an election context. Unlike a general and continuing debate on issues, an election requires the taking of a position with respect to questions of grave importance in a severely limited period of time. Cf. 70 Yale L. J., *supra,* at 1115, n. 194. In a situation where action is required, the public is entitled to know all of the relevant factors, including who supports and who opposes a particular candidate, before it can be requested to choose among them. This is the rationale of the Federal Regulation of Lobbying Act and is applicable equally to the election process. As this Court said in *United States* v. *Harriss, supra,* at 625:

> "Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressure to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depend to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. . . .
>
> Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose."

See also *Canon* v. *Justice Court, supra,* 393 P. 2d at 431; *United States* v. *Scott, supra; President's Committee on Civil Rights. To Secure These Rights,* 51-53 (1947)

maintaining that the volume and skill of modern propaganda make identification of the source of an argument essential to its evaluation. The purpose of identification in no way depends upon the nature of the material printed since the right to know in an election situation embraces the right to know who is speaking in favor of as well as who is opposing a candidate, and who is campaigning with ideas as well as with invective. See also *Lewis* v. *Morgan Publishing Co., supra* at 312.

Appellee's assertion that the source of a statement is not necessary to an evaluation of its truth, is, we are sure, not to be recorded as an Euclidean assertion. Furthermore, it overlooks the fact that campaign literature often deals not in statements of truth or falsity, but in emotional appeals which contain not facts and not ideas but personal factors which may create as strong an impression as a statement relating to the issues in the campaign.

The almost overwhelming complexity of the problem of assessing campaign material in modern times has most recently been evidenced in the promulgation of a "truth in advertising code" aimed at the political scene. The code, promulgated by the American Advertising Federation contains eight points which include not using quotations out of context, visual tricks to make the opponent look unattractive and appeal to prejudice. It also bans disparagement and name calling and guilt by association techniques. New York Times, Tuesday, February 6, 1968, page 67, col. 3. This code highlights the capacity for distortion which exists in a campaign context and is further evidence of the need for whateyer aid knowledge of the source of such campaign material can afford.

Moreover, identification of the source of this material is necessary for the public to be able to assess whether or not that source is so potent or important a figure or committee that it wishes to retaliate at the polls. Then, too, of course, the faceless adversary in an election campaign,

as in a courtroom, cannot be subjected to public questioning with respect to his position. As Chief Justice WARREN noted in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 164 (concurring opinion):

> "[P]ublic opinion may be the only instrument by which society can attempt to influence . . . [the] conduct [of public officials]."

As the Court of Appeals for the District of Columbia has recognized, that opinion must be informed:

> " 'The public plainly has a vital interest not only in the calibre of candidates for political office, but in the nature of two groups of factions supporting the candidates, and the quality of candidates' spokesmen and backers are appropriate condemnations to be taken into account.' *Thompson* v. *Evening Star Newspaper Co.*, 394 F. 2d 775, 776 (D. C. Cir. 1968)."

Not only does publication of anonymous literature with respect to a campaign pressure the public to take sides without providing for the information as to the source of the pressure, but it does so within a period of time which makes it difficult, if not impossible, to ascertain the source before the choice must be made. This is an impermissible imposition both on the public and on the candidates.

This Court has long recognized that time is of the essence in an election campaign. *Mills* v. *Alabama*, 384 U. S. 214, 220. In that case the Court recognized that a law which made it a crime in effect to answer "last minute" charges on Election Day was unconstitutional because that was "the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate 'from confusive last-minute charges and counter charges.' " See also *Anderson* v. *Martin*, 375 U. S. 399; *American Communications Association* v. *Douds*, *supra* at 406. The question of identification *after* the election is completely ir-

relevant to the determination which the public must make with respect to the election and to the answers which the candidate must make with respect to any charges, innuendoes or emotional appeals.

Nor is the statutory refusal to sanction anonymous campaign literature purely hypothetical or academic. As we have said, the New York statute, like the federal statute and the statutes of 36 sister States* is rooted in experience. New York Election Law, Section 457 was enacted in 1962 as an amendment to New York Penal Law, Section 781-b. The original Section 781-b dealt only with printing anony-

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*Ala. Code tit. 17, § 282 (1940); Alaska Stat. § 15.55.030 (1962); Ark. Stat. § 3-1412 (1947 Ann.); Cal. Elections Code § 12047-49 (1965); Colo. Rev. Stat. § 49-21-50 (1963 Ann.); Fla. Stat. Ann. § 104.37 (Supp. 1966); Idaho Code Ann. § 34-104 (1953); Ill. Ann. Stat. ch. 47; §§ 26-1.3 (1963); Iowa Code tit. 35, § 738.22 (1966); Kan. Stat. Ann. § 25-1714 (1913); Ky. Rev. Stat. §§ 123.130 (Supp. 1966); La. Rev. Stat. § 18: 1531 (1950); Me. Rev. Stat. Ann. tit. 21, § 1575 (1964); Md. Code Art. 33, § 221 (1957); Mass. Ann. Laws ch. 56 §§ 39, 41 (1952); Mich. Stat. Ann. § 6.1914; Minn. Stat. § 211.08 (Supp. 1963); Mo. Rev. Stat. tit. 9, § 129.300 (1939); Mont. Rev. Codes § 94-147S (1947); Neb. Rev. Stat. § 32-1131-33 (Supp. 1965); N. H. Rev. Stat. tit. IV, § 70.14 (Supp. 1965); N. J. Stat. Ann. §§ 19:34-38.1-4 (1963); N. D. Century Code § 16-20-17.1 (1959); Ohio Rev. Code § 3599.09 (Supp. 1966); Ore. Rev. Stat. tit. 23, chap. 268, § 260.360 (1955); Pa. Stat. Ann. tit. 25, § 3546 (1933); R. I. Election Law § 17-23-2 (1923); S. D. Code 1939 § 16.9930 (Supp. 1960); Tenn. Code § 2-2238 (1955); Tex. Election Code Art. 14.10 (1951); Utah Code § 20-14-24 (1953); Vt. Stat. Ann. tit. 17, chap. 35, § 2022 (1963); Va. Code 1950 § 24-456; Wash. R.C.W.A. § 29, 85.270 (1965); W. Va. Code 1961, chap. 3, § 218(6) (a-b) (Supp. 1965); Wis. Stat. Ann., tit. II, chap. 12, § 12.16 (1911). Appellee sees no significance in the fact that so many states, as well as the federal government, have had substantially similar statutes for many years without successful challenge. We submit that this view of appellee is untenable. The uninterrupted operation of these statutes without provoking any discussion or any showing of First Amendment deterrent effect is a factor to be weighed by the Court here in appraising the constitutional challenge. Furthermorre, the legislative history of such statutes, both federal and state, *infra*, demonstrates their limited purpose, a consideration the majority opinion stated was absent in *Talley* (362 U. S. at 64).

mous campaign literature and was the result of uncontrolled expenditure, anonymous appeals to ethnic background and other personal factors in the 1940 Presidential election campaign.

The first New York statute was passed virtually simultaneously with the federal statute and relied in large measure on federal documentation available respecting the necessity for such legislation. In 1941 Maurice M. Milligan, a Special Assistant to United States Attorney General Robert H. Jackson, prepared a report to the Attorney General respecting alleged violations of the federal election laws during the 1940 campaign. His report contained specific recommendations for rectifying omissions in the Hatch and Corrupt Practices Act as revealed by testimony before a federal Grand Jury sitting in the District of Columbia to investigate the excessive use of money in the 1940 election. That report which is a part of the legislative history of the New York statute, said that the Grand Jury had found that an excessive sum of money had been used during the 1940 campaign and that while, under the law as it then stood, no indictments could be returned, further curbs were necessary. Among the recommendations of the Committee were those requiring reporting of expenditures and:

> "[A]mending the Corrupt Practices Act to prohibit circulation through the United States mails of any and all literature, the purpose of which is to influence the election of candidates for Federal office, or Presidential and Vice-Presidential electors, or the enactment or defeat of measures before the Congress of the United States, unless it is signed by the person, or persons or committee or organization responsibile for its circulation, together with their addresses. We also suggest that all such printed matter contain the names and addresses of the person, persons, committee or organization responsible for its printing."

Almost simultaneously, Senator Guy M. Gillette of Iowa in the Senate, on February 13, 1941, supported a proposed bill for the identification of those responsible for the circulation of certain types of literature through the mails. As the Senator said:

> "The task of exposing the sources . . . is accepted as a responsibility of government, while the task of answering such propaganda is left largely to private initiative." Congressional Record—Appendix (March 6, 1941, pp. A1111-1112).

The federal statute (18 U.S.C. § 612) enacted as a result embraced anonymous publication or distribution of "any card, pamphlet, circular, poster, dodger, advertisement, writing, or other statement relating to or concerning any person who has publicly declared his intention to seek the office of President, or Vice President of the United States, or Senator or Representative in, or Delegate to or Resident Commissioner to Congress, in a primary, general or special election, or convention of a political party . . ." This was the statute upheld in 1961 in *United States* v. *Scott, supra* (at 443) where the District Court in a criminal prosecution distinguished *Talley* v. *California, supra,* stating that it was passed:

> "So that the electorate would be informed and make its own appraisal of the reason or reasons why a particular candidate was being supported or opposed by an individual or groups. Is there anything sinister in requiring disclosure of identity to the end that voters may use their ballots intelligently? Is it so perfectly apparent what havoc could be wrought by anonymous publications concerning candidates enumerated under § 612."

The original New York statute, which recognized these two sources, was enacted in 1941. It did not go as far as the federal statute. It called for the identification only of

the printer of the anonymous campaign material. Nevertheless, this basic New York statute was supplementary to and implementative of the Congressional legislation to insure the primary *sine qua non* of the operation of a democracy—the ballot. It is significant that in the present case a Congressional election was involved [Multer] and that, if the distribution had been or is subsequently made by mail, that there would have been a violation of the federal statute.

The 1962 amendment to the statute broadened the coverage to include the distributor as well as the printer and, thus, became more identical with the federal statute. It was so enacted following an investigation into the charges and counter charges hurled during the 1961 Mayoralty Democratic Primary campaign in New York City. The two principal candidates for the Democratic nomination for Mayor, each charged that anonymous literature was being circulated by his opponent.

An investigation was conducted by a Special Assistant Attorney General who was counsel to the New York Fair Campaign Practices Committee and attorneys of standing independently selected, who served without compensation.* The investigation was conducted with the cooperation of the National Fair Campaign Practices Committee, Inc.** The investigation committee submitted an interim and a final report. It was established that the Wagner charge that the regular Democratic organizations in the Bronx and Brooklyn circulated anonymous campaign literature was true and that the distribution was dictated by "politics".

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* The interim and final reports of the investigating committee were submitted to this Court in the first *Zwickler* and to the District Court following remand as appendices to the briefs. They are once more annexed as appendices to appellant's brief.

** The Attorney General accepted the recommendation of the Committee in the staff appointments and allowed such counsel uninterrupted independence in their inquiry and in the reports subsequently filed by them.

An examination of the records of the Club circulating the literature disclosed no evidence of expenditures for the printing of such literature. Moreover, a major portion of the 1961 Primary campaign receipts of the Club in question were not recorded and neither the Treasurer nor any person associated with the political committee for the District had filed a financial statement with the Secretary of State as required by Section 324 of the Election Law, nor had a statement been filed identifying the Treasurer of the Committee as required by Section 325 of the Election Law and most important, Section 327 of the Election Law requiring the Treasurer of a political committee to maintain a detailed account of campaign receipts and expenditures including a receipted bill stating the particulars of each expense had not been complied with. The counter charge that Wagner workers had distributed an anti-Semitic leaflet was not established. Indeed, the source of the anti-Semitic literature was never established. Expert printers informed the investigators that the anonymous leaflets had been printed by an unskilled and inexperienced person and Wagner headquarters felt that the circular was an "opposition plant."

The Committee recommended the removal of the "cloak of anonymity", by the amendment of the statute so as to require the campaign literature to bear the name and address of the printer and the person and organization ordering the material. The recommendations of the Commitee were, for the most part, incorporated in the revised legislation.

The new amendment was supported not only by the National Fair Campaign Practices Committee, but also by the Association of the Bar of the City of New York, and the Citizens' Union. Its desirability was further emphasized by the non-partisan support of the Democratic, Republican and Liberal parties, the only major political parties at that time.

The exact impact of anonymous literature on opinion cannot, of course, be precisely assessed. However, it is a well-known phenomenon that the printed word carries an impact of its own which tends to incline the recipient of literature in the suggested direction, even if the literature is anonymous. See WAPLES, BERELSON AND BRADSHAW, WHAT READING DOES TO PEOPLE: A SUMMARY OF EVIDENCE ON THE SOCIAL EFFECTS OF READING AND A STATEMENT OF PROBLEMS FOR RESEARCH (1940), pp. 108-109. This fact has even been demonstrated in the area of campaign literature where it was found that an anonymous leaflet on a controversial subject tended to change the opinion of the recipient of that leaflet in the direction of the position it advocated. Dietsch and Gurnee "The Cumulative Effect of a Series of Campaign Leaflets", 32 Journal of Applied Psychology, 189, 194 (1948). A written communication will cause a change in opinion even if the source or author is one of "low-credibility". Low credibility may result from an author with an antagonistic view or from anonymity. A person who has read the argument tends to dissociate the contents from the communicator. While he forgets the source, he remembers the text and his attitude is change by it as long as he is not reminded of the source. HOVLAND, JANIS AND KELLY, COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE (1953), pp. 280-81. In an election context, of course, where the source is not identified, no one can be reminded of it.

Despite its lengthy opinion, the District Court made no attempt to consider the right of the public to know and no attempt to consider the situation which exists during an election campaign. The Court dismissed those cases in which disclosure has been upheld as "special situations" without once discussing why the instant election situation is not as special as the others. In fact, however, as we have demonstrated the statute is reasonably related to legitimate state concerns and is not too broad to effectuate those concerns. It is thus wholly unlike the cases in which the State

was denied disclosure either for want of a substantial connection between the material sought and a legitimate state purpose or because the statute was not limited to the end sought to be achieved. *Talley* v. *California, supra; Shelton* v. *Tucker, supra; Sherbert* v. *Verner, supra; Gibson* v. *Florida Investigation Committee,* 372 U. S. 539; *N.A.A.C.P.* v. *Alabama, supra; Bates* v. *City of Little Rock,* 361 U. S. 516. The statute struck down by the New York Courts themselves in *People* v. *Mishkin,* 17 A. D. 2d 243 (1st Dept. 1962), *aff'd.* 15 N. Y. 2d 671 (1964), suffered a similar infirmity.

C. No realistic fear of reprisal is justified by § 457.

The District Court relied heavily on a self-created presumption of reprisal if anonymous distribution were not allowed although appellee, significally, did not. No facts were stated to justify such a presumption. Indeed, the national and local atmosphere and the kind of distribution made and disclosure required herein create, if anything, a presumption that fear of reprisal is unrealistic. The only specific reference to reprisal by the lower Court was to the fear of large damage awards (A. 41, 43) an allegation not made in the complaint. However, as the opinion, simultaneously recognized, this Court has taken great strides in extending the First Amendment directly. See, *e.g., Time, Inc.* v. *Hill,* 385 U. S. 374; *New York Times* v. *Sullivan,* 376 U. S. 254; *Associated Press* v. *Walker,* 379 U. S. 47. These cases now effectively insulate political criticism from threat of libel and invasion of privacy suits except in the most outrageous and egregious cases. New York courts have liberally applied the *New York Times* case. *Gilberg* v. *Goffi,* 21 A. D. 2d 517, 251 N.Y.S. 2d 823 (2d Dept, aff'd without opinion 15 N. Y. 2d 1023; *Jacobowitz* v. *Posner,* 28 A. D. 2d 706, 282 N.Y.S. 2d 670 (2d Dept.) aff'd without opinion, 21 N. Y. 2d 936. In *Gilberg,* the Court said:

> "Within the periphery of the new body of case law, we hold, on a balancing of interests, that democratic

> government is best served when citizens, and especially public officials and those who aspire to public office, may freely speak out on questions of public concern even if thereby some individual be wrongful calumnated."

The District Court expressed some amazement that the New York criminal libel laws have been repealed and that therefore a clergyman can falsely be accused of adultery whereas a public official cannot be anonymously confronted with the truth (A. 41).* This merely serves to highlight the limited nature of § 457 and the fact that reprisal for statements is extremely limited, if it exists at all, with respect to public officials. Actually, the circulation of dissenting opinions upon highly emotional issues in this country in non-anonymous form is now a common-place occurrence and arises in virtually daily fashion in our newspapers, magazines and other mass communications media. The fear of reprisal does not deter such publication, nor is there any reason why it should. What the Supreme Court of California said with respect to the California statute in *Canon* v. *Justice Court, supra* at 431, is applicable to New York:

> "[T]here is nothing to indicate that the disclosure requirement, under the circumstances of present-day

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* In fact, criminal libel has rarely been prosecuted in New York before the revision of New York's Penal Law which eliminated libel as a penal offense, as the District Court was informed. Furthermore, since *Garrison* v. *Louisiana*, 379 U. S. 64, 13 L. ed. 2d 125, 135 (1964), the feasibility of such prosecution was sapped. But in a broader sense, the comment of the District Court appears to evidence its lack of appreciation of the public importance of election contests as contrasted, for instance, with the illustration of the minister given by that Court. In these days of tremendous public turmoil, it is hard to understand the District Court's equation of the minister with the candidate for such important office as the Mayor of the City of New York or the U. S. Representative [Multer] referred to in appellee's campaign literature.

California politics, would in fact substantially inhibit expression, even in the limited area to which the statute is applicable . . ."

Relying on *Talley* v. *California, supra,* the District Court and appellee sought comfort in the pre-revolutionary history of anonymous literature in England and in this country. However, as the *Talley* opinion makes clear,* anonymous literature is attributable to the fear of reprisal and not to any finding that it is good in itself. Anonymous literature flourished in an atmosphere of repression which it simultaneously served to destroy. This is apparent from the fact that out of the repression of speech in England and in this country grew not only the First Amendment but the Fifth Amendment privilege against self-incrimination. See CHAFFEE, THE BLESSINGS OF LIBERTY (1956), pp. 179-209. The development of the privilege against self-incrimination is one more aspect of the lack of a continuing need to enforce the right to anonymity in an election context. In fact, none of the anonymous literature relied on by appellee would have fallen with the prohibition of § 457. See generally BLEYER, MAIN CURRENTS IN THE HISTORY OF AMERICAN JOURNALISM (1927), p. 102. The letters of Junius appeared in the London Public Advertiser from 1769 to 1772. The publisher was prosecuted for seditious libel based on one of the letters which was addressed to the King and which protested the policies of the Government. The jury acquitted. BLEYER, *supra* at 23-27. These letters by their appearance in the newspaper would not fall within Section 457 if published in this country. Moreover, since they did not relate to any election campaign they would not have fallen within the statute even if they were circulated as

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* The District Court opinion in the *Scott* case as we have noted, carefully distinguished *Talley* as did the California case of *Canon* v. *Justice Court, supra.* Neither the District Court in the instant case nor the appellee made any effort to challenge either of these decisions directly.

anonymous handbills. The letters of Cato appeared from 1720 to 1723 in British newspapers and were reprinted in colonial newspapers. They concerned theories of liberty and representative government. Once more not only did these letters appear in newspapers, but they were unrelated to any election campaign. BLEYER, *supra,* at 23, 55, 64. The trials of James Franklin and John Peter Zenger would also not have fallen within the provisions of Election Law, Section 457. BLEYER, *supra* at 58-63. Appellee's belated discovery that GULLIVER'S TRAVELS was first published anonymously does not alter the situation. In the first place, the book had a known publisher and in the second place, it was not campaign literature.

The specific leaflet circulated by appellee is an excellent example of speech which never had any need to be anonymous and the anonymity served no useful purpose for the appellee. Essentially, his leaflet was directed at attacking the ethnic loyalty of MR. MULTER in a district in Brooklyn in which the betrayal of such loyalty would not be well received. On the other hand, such information, if accurate, would be well received by the populace of that district.* In this connection, the telling fact is that appellee had no hesitation in orally revealing his identity to the police before he distributed the circular and when he provoked the citizen's arrest. Thus, it is frivolous to raise the spectre of deterrent effect here in the requirement for disclosure.

Actually, the circulation of dissenting opinions upon highly emotional issues in this country in non-anonymous form is now a common-place occurrence and arises in virtually daily fashion in our newspapers, magazines and other mass communication media. The fear of reprisal does not apparently deter such publication, nor, is there

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* It is fanciful to picture one's self as taking any risks in distributing pro-Israeli circulars in this district having a large Jewish population, as shown by the 1960 census. This serves to add emphasis to the wholly unjusticiable nature of the controversy.

any reason why it should. The predilection for anonymity in pre-First Amendment days has given way to the contrary predilection for identification without any fear of reprisal.

The reliance below on *Bates* v. *City of Little Rock, supra* and *NAACP* v. *Alabama, supra* was entirely misplaced. Those cases presented concrete proof of the existence of a hostile atmosphere and the real threat of reprisal against members of the organization under attack. Indeed the very scope of disclosure required in those cases, so much broader than any valid state interest, and so much broader than disclosure required by § 457, is highly indicative of the fact that disclosure was required not for the purposes set forth but for reprisal itself. While § 457 requires the name of only the printer and the person or committee who authorized the printing and distribution, the statutes in the NAACP cases required entire membership lists to be placed on public file. In light of the local atmosphere, it would have been tragic for this information to be spread out for public scrutiny. Indeed those cases involving the associational right of privacy typical involve the requirement of disclosure either of past and therefore stale associations (*DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825) or of essentially passive members of an organization with no official capacity to direct policy or activities. See also *Lamont* v. *Postmaster General*, 381 U. S. 301. By contrast, the instant case presents the requirement of disclosure in a highly active capacity in a limited context and with reference only to current activities.

There is no inherent virtue in anonymity. It is a withholding of information from the public which, if disclosed, might have a considerable bearing on the evaluation of its content. At best, anonymity is an inadequate substitute for open discussion in a political atmosphere more receptive to such discussion. Its function is to permit the promulgation of matter which under certain circumstances would place the promulgator in real fear of reprisal. As

such, it does not support, but rather is inimical to the basic purposes of the First Amendment. In *Canon* v. *Justice Court, supra* at 432, the California Court observed:

> "The chief harm is that suffered by all the people when, as a result of the public having been misinformed and misled, the election is not the expression of the true public will."

POINT II

The District Court erred in concluding that appellee as a citizen was entitled to declaratory judgment as to the validity of the statute when there were no facts at that time to support any claim of justiciable controversy. The expansive view of the District Court requires review by this Court even though the merits are also under review.

In remanding the instant case, this Court directed the District Court to consider whether or not the complaint established a controversy within the meaning of the Declaratory Judgment Act (28 U.S.C. §§ 2201, 2202) and Article III of the Constitution. *Zwickler* v. *Koota,* 389 U. S. 241, 244.

The standard by which the existence of a case or controversy is to be determined, was specifically stated by the Court:

> "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Maryland Cas. Co.* v. *Pacific Coal and Oil Co.,* 312 U. S. 270, 273." *Zwickler* v. *Koota, supra* at 244 n. 3.

The burden was on appellee to "establish the elements governing the issuance of a declaratory judgment". *Id.* at 252, n. 15.

Certainly, the District Court to the contrary notwithstanding (A. 32), the mere existence of a penal statute should not, without more, create a case or controversy (*Poe* v. *Ullman*, 367 U. S. 497), even where a First Amendment claim is alleged. *United Public Workers of America* v. *Mitchell*, 330 U. S. 75.

Appellee has insisted that there was a case or controversy between the parties at the time he filed his complaint and that there is one now. We have maintained from the outset that there was no case or controversy when the complaint was filed but it is absolutely clear that there is none now. The amended complaint was filed on May 3, 1966. It alleged that appellee had previously been prosecuted, unsuccessfully, for violation of N. Y. Penal Law, § 781-b in that, some four days before the 1964 election, he had distributed a leaflet calling on the Representative Abraham Multer to explain why he had voted against cutting off aid to the United Arab Republic and had announced his preference of a "watered down" condemnation of religious bigotry over a denunciation of Soviet anti-Semitism. The evidence established that appellee had distributed one copy of this leaflet, in Mr. Multer's district.

Other than the specific reference to Congressman Multer, the complaint alleged that appellee:

> "desires and intends to distribute in the Borough of Brooklyn, County of Kings, New York . . . the anonymous leaflet herein described . . . and similar anonymous leaflets, all prepared by and at the instance of person other than the plaintiff. The said distribution is intended to be made at any time during the election campaign of 1966 and in subsequent election campaigns or in connection with any election of party officials,

nomination for public office and party position that may occur subsequent to said election campaign of 1966." (A. 9)

The election of 1966 is past. Mr. Multer, the only named target of appellee's antagonism, is a Justice of the New York State Supreme Court. *Zwickler* v. *Koota, supra,* at 252, n. 16. The possibility of Mr. Multer's running for office again, which appellee suggested below, is so remote and hypothetical as scarcely deserving discussion. The case has, in fact, become moot, a possibility noted by this Court on the remand. See, *e.g., Flast* v. *Cohen,* 392 U. S. 83; *Gray* v. *Board of Trustees,* 342 U. S. 517; *Brownlow* v. *Schwartz,* 261 U. S. 216.

The District Court gave no weight to the facts that the election of 1966 has passed and that Mr. Multer is no longer a Congressman. It accepted as establishing a controversy the claim that appellee intends at some unspecified time to distribute "similar anonymous leaflets" (A. 9). But that allegation by itself is utterly meaningless. The complaint does not state in what respect the leaflets will be similar. Certainly they would not be similar with respect to Justice Multer. The time at which these mysterious distributions will be made is alleged solely in terms of a parroting of the statute and, being all-inclusive, says nothing. The bare allegation of intent simply does not carry appellee's burden that he establish a case of "immediacy and reality". *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.,* 312 U. S. at 273; *United Public Workers of America* v. *Mitchell,* 330 U. S. at 89. Moreover, the action was to be considered by the Court in the "final shape" it had taken on. See *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240-241; *Public Service Comm'n of Utah* v. *Wycoff Co., Inc.,* 344 U. S. 237, 243-244.

With the accession of Mr. Multer to the bench and away from the campaign scene, the complaint reduces itself to an expression of appellee's distaste for the statute, if indeed, it was ever any more. The most serious charge ap-

pellee can bring against the statute has nothing to do with fear of exposure or reprisal. Instead he ingenuously states that he "intends to distribute said leaflet and similar leaflets anonymously because of his belief and claim that the statute . . . is unconstitutional" (A. 9). That, it is submitted, is a classic statement of a hypothetical, academic question. In short, appellee says, there exists a statute of which he disapproves. It proscribes activity which he feels compelled to undertake not because of any inherent need he has to perform the activity but only because he feels that it should not be proscribed. The statute was, for appellee, father to the deed. "[T]he remedy of declaratory decree, however, was never intended to be an instrument to be used by those merely curious or dubious as to the true state of the law no matter how meritorious they conceive their theory to be." *Fair* v. *Adams,* 233 F. Supp. 310, 312 (N. D. Fla. 1964).

While the previous unsuccessful prosecution of appellee may have colored his claim, it did not render it justiciable. That the arrest was provoked is obvious; that no prosecution has ever succeeded under the statute is a matter of record; that no subsequent prosecution or threat of prosecution is alleged to have been made by appellant against appellee *or anyone else* is undeniable. Certainly, it is not contended that the above factors are dispositive of the matter, but they are indicative of the atmosphere in which the prosecution took place and of the lengths to which appellee would have to go to make them take place again. When coupled with the fact that the only identified object of his antipathy is no longer available and with the further fact that, in 1967 appellee allowed publication of his name on a circular against Mr. Multer with respect to the judicial election that year, the controversy asserted by him is dissipated.*

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* The circular was referred to on the prior oral argument before this Court and was offered to the District Court which rejected it as immaterial (A. 52). It is submitted that this holding was erroneous.

Both appellee and the District Court seemed to regard it as a separate point that appellee alleged that he had been "chilled" in the exercise of his First Amendment rights. The forbidden "chill" is not a talisman whose existence may be substituted for allegations of fact. The word has no inherent value of its own entitling appellee to declaratory relief irrespective of the absence of concrete allegations. His contention that, but for the statute, he would distribute some unspecified literature at an uncertain time about an unnamed candidate is inadequate. His allegation that the statute is "overbroad" besides having no tenable basis (see *supra* Pt. I), does not entitle him to relief absent the necessary allegations with respect to his interest in the question.

Appellee failed to show that the statute will place any limitation on his future behavior and consequently under the decisions of this Court, he failed to meet the requirement of first showing that the statute he challenges is currently affecting his behavior. See *Dombrowski* v. *Pfister*, 380 U. S. 479; *Baggett* v. *Bullitt*, 377 U. S. 360; *NAACP* v. *Button*, 371 U. S. 415; *Smith* v. *California*, 361 U. S. 147.

The District Court and appellee erroneously placed great reliance on the decision of this Court in *Evers* v. *Dwyer*, 358 U. S. 202 apparently because *Evers* recognized that merely because a case is a "test" case it is not to be denied "case or controversy" status. Neither, however, should it be granted such status. The plaintiff in *Evers* sought to break the segregated bus system in Memphis. He got on a bus and was threatened with arrest. He undertook to challenge a pervasive practice, rigidly enforced at every level of state and local government, with respect to a daily activity. As the Court held:

> "A resident of a municipality who cannot use transportation facilities therein without being subjected by

statute to special disabilities necessarily has, we think, a *substantial immediate and real interest* in the validity of the statute which imposes the disability." (*Id.* at 204) (Emphasis supplied)

But this Court in *Evers* was careful to point out that "the federal courts will not grant declaratory relief in instances where the record does not disclose an 'actual controversy' " (358 U. S. at 203) and to endorse the same statement in *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 later also referred to in *Zwickler* v. *Koota, supra,* at 244, n. 3.

While the disposition by the District Court here under review passed on the merits adversely to the State and it is of the highest importance to the State's electorate that such decision upon the merits be reviewed and the state requirement protecting the electorate upheld (See Point I), nevertheless the expansive view of justiciable controversy expressed below by the District Court is so potent of misunderstanding that this Court should set forth its views as to whether there is, in fact, a right to declaratory judgment in the posture of the case.

POINT III

The granting of injunctive relief by the District Court was unwarranted and in direct contravention of prior decisions of this Court. There was an entire absence of any basis for the maintenance of the injunction against the local district attorney.

Without any discussion as to its necessity, the District Court granted injunctive relief apparently as a matter of course (A. 52). The Court seemed to regard an injunction as an automatic concomitant of declaratory relief. Not a single fact was established which would even tend to indicate the necessity for this extraordinary exercise of

power. The decision of the Court to grant an injunction under such circumstances directly contradicts a long line of decisions by this Court.

In its original decision in this case this Court was careful to distinguish between the standard for declaratory judgment and the standard for injunction and specifically reiterated its holding in *Douglas* v. *City of Jeanette,* 319 U. S. 157, in which the Court declined to issue an injunction even though it had the same day struck down the statute whose enforcement was sought to be enjoined (*Murdock* v. *Pennsylvania,* 319 U. S. 105). *Zwickler* v. *Koota,* 391 U. S. 241, 254-55. The Court had only recently reiterated this distinction in *Dombrowski* v. *Pfister,* 380 U. S. 479 and has subsequently reiterated it in *Cameron* v. *Johnson;* 390 U. S. 611.

In order to secure injunctive relief appellee was required to show that he was presently being barred from distribution so as to suffer irreparable damage and that the conduct of state officials was such that he was being subjected to harassment. *Dombrowski* v. *Pfister, supra; Watson* v. *Buck,* 313 U. S. 387; *Wells* v. *Hand,* 238 F. Supp. 779 (D. Ga. 1965), *aff'd* 382 U. S. 39. Indeed, far from showing the kind of official conduct present in *Dombrowski* v. *Pfister* and absent in *Cameron* v. *Johnson* there was no showing that the appellant would not comply with an order granting declaratory relief. In fact, the complaint acknowledges that the District Attorney is a "diligent and conscientious public officer" who would act in good faith* (A. 9). The allegation of a First Amendment claim does not alter the requirement for a showing of irreparable injury. All of the cases cited above involved such claims.

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* Mr. Koota is no longer the District Attorney of Kings County. Mr. Golden, the appellant in this case, will be acting District Attorney of Kings County until January 1, 1969. At that time he will be succeeded by Eugene J. Gold.

We can only assume that the District Court's action in the grant of the injunctive relief without assigning any reasons was dictated by a recognition of the fact that there was no proof, other than the existence of the statute, of any threat to the appellee. The only defendant was the District Attorney of one of the 62 counties of the state. Whatever the motivating force for this disposition by the District Court, there never was at the time of the commencement of the action and there was not at the time of such disposition any case for injunctive relief.

CONCLUSION

For the foregoing reasons the order of the District Court should be reversed and the complaint dismissed.

Dated: New York, New York, November 29, 1968.

Respectfully submitted,

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State of New York
Attorney for Appellant

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APPENDIX "A"

INTERIM REPORT

To: Honorable Louis J. Lefkowitz
Attorney General of the State of New York

From: John G. Bonomi
Special Assistant Attorney General
Counsel, New York Fair Campaign Practices Committee

Re: Printing and Distribution of Anonymous Campaign Literature in 1961 Mayoralty Primary

Introduction

This is an interim report of the Attorney General's investigation into the printing and distribution of anonymous "hate literature" during the 1961 primary campaign for Mayor in New York City.

The present inquiry was instituted at the request of the two Democratic primary candidates, New York State Comptroller Arthur Levitt, the "regular" organization candidates and Mayor Robert F. Wagner.

In the last days of the primary campaign a torrent of charges and counter-charges concerning the printing and distribution of anonymous "hate literature" emanated from the two opposing Democratic factions.

We have restricted our investigation to complaints concerning *anonymous* "hate literature", which may be violative of § 781-b of the Penal Law. This statute provides criminal penalties for the printing of any campaign literature which does not identify the printer or sponsoring organization. The full text of this statute is as follows:

"§ 781-b. *Printing or other reproduction of certain political literature.* No person shall print or reproduce

in quantity by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the State Constitution whether in favor of or against such political party, candidate, committee, person, proposition or amendment to the State Constitution, in connection with any election of public officers, candidates for nomination for public office, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof or of the person and committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed or reproduced, and no person nor committee shall so print or reproduce for himself or itself any such handbill, pamphlet, cicular, post card, placard or letter without also so printing or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee, at whose instance or request a handbill, pamphlet, circular, postcard, placard or letter is printed or reproduced by such principal, and does not include a person working for or employed by such a principal."

Our interim report concerns two such complaints: (1) The Wagner charge that the regular Bronx Democratic organization circulated a packet of anonymous "hate literature" implying that the Mayor was a "Communist

Puppet"; and (2) the Levitt charge that Sanitation Department employees in Queens, distributed an anonymous "Anti-Semitic" leaflet directed against the candidacy of Comptroller Levitt.

After exhaustive investigation we have established that the regular Democratic organizations in the Bronx and Brooklyn did, in fact, distribute the anonymous packet implying Wagner was a "Communist Puppet".

We have found no evidence to support the Levitt complaint that an "Anti-Semitic" leaflet was distributed by Wagner workers or anyone else. Indeed, the Queens Democratic leader who purportedly brought this leaflet to the attention of Levitt headquarters has questioned its origin and authenticity.

Initiation of Investigation

On August 31, 1961, Comptroller Levitt, one of the two candidates in the Democratic mayoralty primary, issued a public statement which, in part, charged that New York Sanitation Department employees were making anti-semitic arguments and circulating anti-semitic leaflets in support of Mayor Wagner's candidacy. This public charge was supported by the release of the "Anti-Semitic" leaflet, purportedly being distributed. On September 1, the Comptroller sent a formal letter of complaint to the Attorney General requesting an investigation.

Mayor Wagner denied any knowledge of the charge and requested that the Fair Campaign Practices Committee, a national non-partisan organization, initiate an inquiry. On September 4, the Attorney General asked the Fair Campaign Practices Committee to nominate an attorney who would be appointed a Special Assistant Attorney General under § 69 of the Executive Law to conduct the requested investigation.

Two days later, on September 6, the Attorney General appointed John G. Bonomi, a Special Assistant Attorney

General pursuant to the recommendation of this Committee. The New York City Fair Campaign Practices Committee was organized on the same day, under the aegis of the national group. To assist in the probe Special Assistant Attorney General Bonomi nominated, the New York City Fair Campaign Practices Committee approved, and the Attorney General appointed the following Special Assistant Attorneys General: Manuel Guerreiro; Alexander Holtzman; Donald A. Hopper; Allan A. Pines; William Rand; Walter Wager; and Thomas Weaver. All are practicing attorneys and served on a part time basis, without compensation.

At the request of Special Assistant Attorney General Bonomi, the Superintendent of the New York State Police assigned two investigators to the staff for the conduct of field investigations.

Wagner Charge

On September 6, 1961, Mayor Wagner charged that the regular Bronx Democratic organization was circulating a packet of anonymous "hate literature" implying that he was a "Communist Puppet". This packet consisted of the following four pieces of literature which bore neither the identity of the printer nor the sponsoring organization:

(1) A poster featuring a cartoon in which Mayor Wagner is depicted as a puppet of ex-Senator Herbert Lehman, Mrs. Eleanor Roosevelt, and three labor leaders. A caption on the poster urges voters to "Stop" Lehman, Mrs. Roosevelt et al. and "their Puppet Wagner and all other Splinter Groups, A.D.A.'s and Left Wingers from taking over the Democratic Party";

(2) A poster with the caption "Lehman's Niece Bails Soviet Spy Soblen". The body of this poster consists of a copy of an article appearing in the August

29, 1961 issue of the New York Daily News concerning Dr. Robert Soblen, recently convicted of espionage for the Soviet Union. The portion of the article which notes that Lehman's niece furnished bail for Soblen is encircled;

(3) A copy of a photograph of Mayor Wagner with Mrs. Roosevelt which appeared in the August 22, 1961 issue of the New York Post; and

(4) An article in the January 17, 1953 issue of "The Tablet" lauding Comptroller Levitt's anti-communist activities.

The Mayor referred to this packet as "the most scurrilous kit of campaign literature in the history of American politics".

"What is more" the Mayor stated, "reports have reached us that these anonymous leaflets were masterminded by Boss DeSapio and carried out by Boss Buckley's machine in the Bronx. We know that envelopes similar to these were addressed by clubhouse members all last week to special Irish mailing lists. We have received reports that the leaflets were stuffed in Boss Buckley's own clubhouse under the direction of Philip Gilsten, the discredited former Deputy City Treasurer."

Investigation of Wagner Charge

In our investigation of the Wagner charge we interviewed about one hundred persons including Philip Gilsten, the Democratic leader in the 8th Assembly District in the Bronx and Executive Member of the North End Democratic Club, 416 East 189th Street, The Bronx; Benjamin Gluckow, Secretary to Congressman Charles Buckley and Secretary of the North End Democratic Club; New York City Councilman Thomas J. Cuite, the co-ordinator of the Levitt primary campaign in Brooklyn; Carmine

DeSapio, former Chairman of the New York County Democratic Committee; registered Democratic voters in the 3rd Assembly District of The Bronx; printers of campaign literature; and campaign consultants to the opposing groups in the Democratic primary.

The original complaint concerning the anonymous "Communist Puppet" kit was made by a family residing in the 3rd Assembly District in the Bronx. This family had received the anonymous kit by mail in an unmarked envelope.

Interviews in the field with registered Democratic voters in the complainant's neighborhood established that a number had received identical kits in unmarked envelopes.

On October 4 two Special Assistant Attorneys General, Donald A. Hopper and Allan A. Pines, interviewed Philip Gilsten at the executive offices of the North End Democratic Club, the so-called "[Congressman] Buckley clubhouse".

Gilsten readily admitted that the anonymous campaign packet implying that Wagner was a "Communist Puppet" was distributed in the Bronx under the auspices of the North End Democratic Club. He described the North End Club as a "drop" for a substantial portion of the Levitt campaign literature distributed in the Bronx. Gilsten further explained that all of the regular Democratic clubs in the Bronx used the North End's facilities for the "processing" of campaign material because of its spacious quarters and considerable experience in this activity.

Gilsten stated that workers from all of the regular Bronx Democratic clubs came to the North End Club to aid in the preparation of the anonymous "Communist Puppet" kit for distribution. He also reported that some of the anonymous kits were mailed directly from the North End Club while others were circulated by the regular Democratic clubs in their own areas.

Gilsten characterized the anonymous "Wagner Puppet" leaflet as "brilliant" in conception. He said the distribu-

tion of the anonymous kit was dictated by "politics" and commented "we were fighting for our political life".

Benjamin Gluckow, Secretary to Congressman Charles Buckley and an officer of the North End Club, confirmed Gilsten's statements concerning the distribution of the "Communist Puppet" kit. Upon interview, he stated that he and other workers in the regular Bronx Democratic organization prepared the anonymous kit at the North End Club. He described his role as "stuffing envelopes" with the four leaflets. Gluckow volunteered the information that the North End Club had special "Irish, Italian and Jewish" mailing lists and that the "Communist Puppet" kit "probably went to the Irish list".

Councilman Thomas J. Cuite, the co-ordinator of the Levitt primary campaign in Brooklyn, admitted that the anonymous "Communist Puppet" kit was distributed in Brooklyn through the Levitt campaign headquarters in that borough.

Cuite said that on Friday, September 1, 1961 an unknown "printer" notified him by telephone that certain Levitt campaign literature could be picked up at a "printing or binding firm in Mount Vernon, New York". He said that since he was unable to make arrangements for a Friday pick-up the unknown "printer" said that he would leave the materials at a Democratic club in the Bronx "one block south of Fordham Road . . . right near Webster Avenue". According to Cuite, the following morning, September 2, he set out in search of this Democratic Club. By meticulously following the travel directions of the unknown "printer" Cuite said he arrived at the North End Democratic Club. Cuite further related that upon arrival at the club he was ushered into its executive offices and introduced to Philip Gilsten. Then Cuite said "In that room I asked if there was any material for the Levitt campaign for Brooklyn headquarters. And the gentleman whom I was speaking to called for some other man and

told him I was there to pick up the material for Brooklyn". This latter person, whom Cuite is unable to identify, then guided the Councilman to a public garage situated on an obscure sidestreet in the Bronx. Then Cuite and his unknown guide transferred nine cartons of Levitt campaign literature from a car parked in the garage to Cuite's automobile.

According to Cuite, it wasn't until the following Tuesday, September 5, that he discovered that the nine cartons contained three of the four leaflets included in the anonymous "Communist Puppet" kit. The Councilman said that he stored the closed cartons in the assembly room of Levitt's campaign headquarters in Brooklyn over the Labor Day weekend and they were not opened until September 5. Councilman Cuite said that he obtained the fourth anonymous leaflet in the "Communist Puppet" kit directly from a firm known as the Seminole Printing Corporation.

Cuite stated that Levitt's Brooklyn headquarters distributed the anonymous "Communist Puppet" literature to the borough's regular Democratic leaders for use in their home areas.

As noted previously, one of the anonymous circulars included in the "Communist Puppet" kit was a copy of an article appearing in "The Tablet", praising Comptroller Levitt's anti-communist activities. We have established that 100,000 copes of this anonymous circular were printed by Seminole Printing Corporation, Inc., 225 Varick Street, New York. Another 50,000 copies of the circular were printed by Printolith Corp., 118 East 25th Street, New York, at the request of the Seminole Corporation.

Joseph Cohen, the proprietor of Seminole was unable to explain the absence of any printer's or sponsor's identification on this circular. Max Weiss, the president of Printolith admitted the omission of any identification on the anonymous "Tablet" circulars he printed.

Appendix "A"

William Volet, Executive Assistant to Comptroller Levitt, placed the two orders with Seminole. There is no evidence that Volet instructed either printer to omit the identification required under the law.

Our investigation to determine the printer of the three other anonymous circulars included in the "Communist Puppet" kit has been temporarily delayed by an order of Justice George Tilzer of the New York State Supreme Court restraining the Attorney General from obtaining the books and records of the North End Democratic Club. In order to ascertain whether the North End Club ordered this anonymous literature we served Philip Gilsten on October 4, with a personal subpoena and a subpoena duces tecum calling for certain books and records of the Club. Gilsten did not appear at the Attorney General's office on the return date of the subpoena, October 6. On Sunday, October 8, Justice Tilzer signed an order to show cause why both subpoenas should not be vacated or modified. He also signed a stay order enjoining the Attorney General from taking "any steps or proceedings to compel the appearance of Gilsten" or the production of North End's books. The Attorney General is further restrained under this order from proceeding against Gilsten for contempt. As of this date the motion is still pending in Part I of the Supreme Court.

Upon interview Carmine DeSapio denied Mayor Wagner's charge that he "masterminded" the "Communist Puppet" kit. Our investigation has uncovered no evidence that DeSapio either "masterminded" or participated in any way in the distribution of this literature.

Levitt Charge

On August 31, 1961, Comptroller Levitt issued a public charge that campaign workers for Mayor Wagner had injected anti-Semitism into the Democratic primary con-

test. Comptroller Levitt said, "I have confirmed that 600 workers of the Sanitation Department are working in Queens . . . using the argument that a victory for Levitt will leave a Jew to run against a Jew—Levitt v. Lefkowitz". On the same date Levitt headquarters released a photographic copy of what a spokesman called a sample of the anti-Semitic literature allegedly distributed in Queens. This "Anti-Semitic" circular bore the legend:

IRISH AMERICAN DEMOCRATS
VOTE FOR WAGNER
On Primary Day
Thurs. Sept. 7th
3 PM to 10 PM
OR ELSE YOU WILL HAVE
A LEVITT OR A LEFKOWITZ AS MAYOR

The LEVITT headquarters identified Matthew Troy, Jr., Democratic Leader in the 9th Assembly District, Part A in Queens and Harold Fisher, Chairman of the Law Committee of the Brooklyn Democratic organization, to the press as the sources of these charges. This public statement received wide publicity in the metropolitan newspapers and appeared on page one of the New York Times on September 1.

On September 1, Comptroller Levitt sent a formal complaint to the Attorney General which stated in part that "groups have been busy going into the non-Jewish areas using the argument that unless Wagner is elected in the Primary 'the Jews will take over City Hall'.

"The history of this kind of campaign is not new in American politics. Every major Jewish figure has been subjected to it. I can recall instances in the past when this same vile literature—unattributed, irresponsible, bigoted in every respect—was used against Herbert Lehman . . . I am asking for nothing more than what he has always

asked—that the purveyors of this literature and the whispering hate mongers be stopped". (Underlining added by our staff)

To support this charge of the distribution of anti-Semitic literature the Comptroller attached as an exhibit "a photostatic copy of literature addressed to Irish-American Democrats"—the anonymous "Anti-Semitic leaflet to which we have previously referred. The Levitt complaint included no evidence in this matter beyond the naked charge and the copy of the "Anti-Semitic" leaflet. On the same evening the Comptroller appeared on NBC—TV and repeated the charge. At that time he once again exhibited a copy of the anonymous "Anti-Semitic" leaflet. Two days later, on September 3, Comptroller Levitt stated on the "Direct Line" television program, "these instances of anti-Semitic literature were brought to my attention from responsible sources" (underlining added by our staff).

Investigation of Levitt Charge

During the course of this inquiry into the anonymous "Anti-Semitic" circular over 100 witnesses were interviewed, including Frank Lucia, New York City Commissioner of Sanitation; a considerable number of Sanitation Department supervisors and employees active in the Wagner primary campaign; campaign advisors to the Mayor; registered Democratic voters in the 9th Assembly District in Queens; the Democratic leader of Part A of that Assembly District, Matthew Troy, Jr.; Harold Fisher, Chairman of the Law Committee of the Brooklyn Democratic organization; former Justice Daniel V. Sullivan, Levitt's campaign manager; William Van Heuvel, a Levitt campaign consultant; and Irwin Rosenthal, a researcher at Levitt headquarters at the Hotel Biltmore, Manhattan.

Appendix "A"

Our investigation established that in August, 1961 Sanitation Commissioner Frank Lucia organized a 9th A. D. Independent Citizens Committee for Wagner in the Queens Village area. About seventy persons, mainly Sanitation Department employees, "volunteered" or were recruited by the Uniformed Sanitationmen's Union as workers for this Committee. During the period before the September 7 primary this Wagner Committee conducted a highly organized camaign on behalf of the Mayor, including door-to-door canvassing and distribution of literature. The Levitt group charged that these campaign workers were making anti-Semitic arguments and distributing the anonymous "Anti-Semitic" circular.

Matthew Troy, Jr., identified by the Levitt group as the person who originally brought the "Anti-Semitic" circular to their attention gave sworn testimony before our staff on two occasions. Troy said that several weeks before the primary he began to receive reports that sanitation workers with the 9th A. D. Citizens Committee for Wagner, were making anti-Semitic arguments in door-to-door canvassing. He said that he transmitted these reports to Irwin Rosenthal, a member of the Levitt research staff. Troy further stated that, on the urging of Rosenthal, he went to regular Democratic headquarters in the Biltmore Hotel and repeated these reports to Levitt's campaign advisors.

He said that he was asked at that time whether any anti-Semitic circulars were being distributed in the Queens Village area. Troy said that he told the Levitt advisors that no such reports had been made to him. According to Troy he saw a copy of the "Anti-Semitic" leaflet for the first time on September 1 at Levitt headquarters in the Biltmore Hotel. The questioning of Troy was as follows:

> Q. Well, sometime before September 1st, when Mr. Levitt appeared on television with this exhibit did you

see an original of the circular at the Biltmore? A. Yes, I believe it was on September 1st that I saw it. . . .

Q. Did you bring that original to the Biltmore? A. No, I did not.

Q. Do you have any knowledge of how it arrived at the Biltmore? A. I have none whatsoever, except to say that was there in the room and showed to me when—after I had come into the room. I have no idea. idea.

Q. Who showed it to you? A. I don't remember now. I don't remember at all.

Q. Well, what did the people at the Biltmore have to say about the source of this literature? A. If I recall, I asked them where they got this piece of literature, and they said that the captains from the districts were bringing them in. And from the way they talked I assumed that they had more. I thought they had. Well, it was in my own mind, but I felt they had better than 20 of them. The way they said the captains were bringing them in. It seemed to be a multiple operation rather than just one, but the one they showed me was a very rolled up—it had been straightened out now, but it appeared to have rolled up and creased or it had been left lying somewhere, and a person might roll it up and throw it away.

On August 31, the Levitt headquarters released a copy of the "Anti-Semitic" circular to the press and on the following day this leaflet was exhibited over television by Comptroller Levitt.

Troy gave sworn testimony that on September 4th, five days after the "Anti-Semitic" circular exhibit was released by Levitt Headquarters, an unknown person brought a copy of this leaflet to his office at the Queens Village Democratic Club. Troy said that this was the first time he knew of any such circular in the Queens Village area. He

stated that he thought the bearer of this circular "might be planted or he might be being used by somebody to plant it in our area to give credence to the story that was being told." Troy stated that he brought the "Anti-Semitic" circular to Levitt headquarters on September 5 or 6. At that time, according to Troy, he told the Levitt campaign staff that he "doubted the authenticity of the piece of literature."

We have been advised by expert printers that the anonymous "Anti-Semitic" leaflet was an "amateur's job". These printers are of the opinion that the composition of the circular indicates that it was printed by an unskilled and inexperienced person.

Commissioner Lucia and all of the Sanitation Department employees interviewed, denied any knowledge of the printing or distribution of the anonymous "Anti-Semitic" leaflet. In fact, Lucia opined that the circular was an "opposition plant". Interviews by our field staff with registered Democratic voters in the 9th Assembly District in Queens uncovered no person who had received a copy of this anonymous leaflet.

Harold Fisher, Chairman of the Brooklyn Democratic Law Committee, identified by Levitt headquarters as a second complainant in this matter, was also interviewed by our staff. Fisher recalled receiving complaints about anti-Semitic arguments being used by Wagner workers. However, he was unable to identify any person who made such complaints. He further stated that he had no information about the distribution of the anonymous "Anti-Semitic" leaflet and saw it for the first time when Comptroller Levitt appeared on television on September 1.

We enlisted Comptroller Levitt's aid in tracing the source of the anonymous "Anti-Semitic" circular utilized in his public statement of August 31 and his television appearance of September 1. He referred our staff to

William Vanden Heuvel, a campaign advisor. Comptroller Levitt, in a letter to Special Assistant Attorney General Bonomi, dated October 19, 1961, stated, "I was handed the literature in my New York City Headquarters by Mr. William Vanden Heuvel".

Vanden Heuvel, upon interview, said that he had no personal knowlege how many copies of the "Anti-Semtic" circular arrived at Levitt Headquarters but speculated "I would presume it came from Matthew Troy or his captains, or the people in that area who received it. It possibly could have come anonymously in the mails as many things that crop up in campaigns unfortunately arrive".

No other campaign advisor at Levitt Headquarters was able to cast any light on the source of the anonymous "Anti-Semitic" leaflet. A few believe, however, that Matthew Troy, Jr., had reported the distribution of this literature in the Queens Village area prior to September 1.

Troy was also interviewed concerning the Levitt charge that anti-Semitic arguments were being used by Wagner workers in door-to-door campaigns. He said that two captains in his Assembly District reported the use of anti-Semitic arguments by Wagner campaign workers. However, Troy refused, under oath, to identify these captains or give any information about complaints of this nature in the Queens Village area. Only one of Troy's election captains, Salvatore Sciame, stated that he heard such reports. He said that unidentified customers of his grocery store told him "that somebody had approached them saying that it would be a situation (if Wagner lost the primary) where a Jew would be running against a Jew". Interviews by our staff in Sciame's election district failed to uncover any Democratic voter who heard anti-Semitic arguments being used by Wagner workers. The Sanitation Department personnel appearing before our staff denied any such activity.

• • • •

Appendix "A"

We will submit a *final* report at a later date concerning our further investigative findings, conclusions and legislative recommendations.

In closing this *interim* report, we wish to express our appreciation to the Attorney General for the cooperation afforded this investigation in generously providing office space and extensive clerical help. We might also note that the Attorney General has scrupulously adhered to his pre-investigation pledge to give our staff a "free hand" in the conduct of this inquiry.

APPENDIX "B"

Final Report

To: Honorable Louis J. Lefkowitz
Attorney General of the State of New York

From: John G. Bonomi
Special Assistant Attorney General
Counsel, New York City Fair Campaign Practices Committee

Re: Printing and Distribution of Anonymous Campaign Literature in 1961 Primary and General Elections in New York City

Introduction

This is the "Final Report" of the Attorney General's investigation into the printing and distribution of anonymous literature during the 1961 primary and general election campaigns in New York City. On November 3, 1961, we publicly released our "Interim Report".

In this report, we have incorporated additional investigative findings and our legislative recommendations. Our investigative findings concern campaign literature which may have been printed, distributed and financed in violation of § 781-b of the Penal Law and/or Article 13, §§ 320-328 of the Election Law (see Appendix I for full text of § 781-b, Penal Law). In addition, we have conducted two studies which suggest serious defects in Section 781-b.

Section 781-b provides criminal penalties for the printing of any campaign literature which does not identify either the printer or sponsoring organization.

Artcle 13 of the Election Law requires that "political committees" file detailed statements of all campaign receipts and expenditures (including those financial transactions which relate to the printing and distribution of campaign literature) with both the New York Secretary of

State and the New York City Board of Elections. A "political committee" is defined by this Article as any group of three or more persons cooperating to aid in the election or defeat of a political candidate (§ 320, Election Law).

Under § 776 of the Penal Law, a treasurer of a "political committee" who neglects to file the financial statement required by the Election Law is subject to criminal penalties. Any person who knowingly and willfully violates any other section of Article 13 is chargeable with a misdemeanor under § 783 of the Penal Law (see Appendix II for full texts of §§ 776 and 783, Penal Law).

Summary of Findings

In our November 1961 "Interim Report", we found no evidence, whatsoever, to support a complaint by the regular Democratic organization that an anonymous "Anti-Semitic" leaflet had been distributed by workers for Mayor Robert F. Wagner.

We did, however, establish that the regular Democratic organizations in the Bronx and Brooklyn distributed anonymous literature during the 1961 primary campaign implying that the Mayor was a "Communist Puppet". We further ascertained the identity of two printers responsible for the illegal printing of 150,000 copies of this anonymous literature (§ 781-b, Penal Law).

Now, in this "Final Report", we set forth the results of the following investigations and studies:

(1) *"Communist Puppet" Kit*

Since our "Interim Report" on "Communist Puppet" literature, we have obtained the *sworn* testimony of Philip Gilsten, a Bronx Democratic leader and Executive Member of the North End Democratic Club. Gilsten's sworn testimony confirmed our interim finding that the North End

Club acted as a distribution center for "Communist Puppet" circulars.

An examination of the records of the North End Club disclosed no evidence of expenditures for the printing of anonymous literature. However, these records were maintained by Gilsten in clear violation of those provisions of the Election Law which require detailed accounting of campaign receipts and expenditures.

(2) *"Wagner Committee"*

John J. Gilhooley, a Republican candidate for City Controller, denounced a political advertisement in the November 4 issue of the "Irish Echo", a weekly newspaper, as a "minority appeal". The ad was bare of sponsor's identification except for a line reading "Independent Citizens Committee for Wagner, Screvane and Beame".

Wagner Campaign Manager Edward P. Cavanaugh promptly disavowed the ad as "unauthorized" and "deplorable". Upon interview, Sean Keating, then Assistant to the Mayor, defended the ad as not "too outrageous".

Our inquiry revealed that the ad's sponsoring committee was conceived at a meeting between Keating and two friends at Wagner headquarters. Keating said that his overriding concern was whether "they had Wagner, Beame and Screvane's name" on the ad and claimed only a casual interest in the committee's activities after the first meeting. The evidence indicates that the committee was formed without the knowledge or authorization of the Mayor and subsequently operated independent of Wagner headquarters.

There are no provisions in the Penal or Election Laws governing the identification of sponsors of political ads appearing in newspapers, magazines and other periodicals. As a consequence, such a sponsoring group may remain anonymous or identify itself in a vague and misleading manner.

Appendix "B"

(3) *"Anonymous Posters"*

Our second study involved anonymous (but non-scurrilous) political posters exhibited in Democratic primary contests in the Yorkville and East Harlem areas of New York. These posters, which came to our attention during the interim investigation, supported the regular organization candidate for District Leader and City Councilman in those areas, John J. Merli. Our staff uncovered the printer and financer of these placards.

Under § 781-b of the Penal Law, a printer may be held criminally responsible for those anonymous posters which relate to the election of "public officers" such as city councilmen. However, he may not be prosecuted for printing anonymous placards which concern a district leader contest since elections of "party officers" are omitted from the provisions of Section 781-b.

(I)

INVESTIGATION RE: "COMMUNIST PUPPET" KIT

Philip Gilsten, Democratic leader in the Eighth Assembly District of the Bronx and Executive Member of the North End Democratic Club, had been interviewed at the North End Club on October 4. At that time, Gilsten readily admitted that an anonymous campaign packet implying that Wagner was a "Communist Puppet" was distributed in the Bronx under the auspices of the North End Democratic Club. He described the North End Club as a "drop" for a substantial portion of the Levitt campaign literature distributed in the Bronx. Gilsten further explained that all of the regular Democratic clubs in the Bronx used the North End's facilities for the "processing" of campaign material because of its spacious quarters and considerable experience in this activity.

Appendix "B"

Gilsten, in the October 4 interview, stated that workers from all of the regular Bronx Democratic clubs came to the North End Club to aid in the preparation of the anonymous "Communist Puppet" kit for distribution. He also reported that some of the anonymous kits were mailed directly from the North End Club, while others were circulated by the regular Democratic clubs in their own areas.

Gilsten, at that time, characterized the anonymous "Wagner Puppet" leaflet as "brilliant" in conception. He said the distribution of the anonymous kit was dictated by "politics" and commented, "we were fighting for our political life".

In order to obtain *sworn* testimony of Gilsten and ascertain whether the North End Club had ordered any of this anonymous literature, we served Gilsten, on October 4, with a personal subpoena and a subpoena duces tecum calling for certain books and records of his organization. Gilsten did not appear at the Attorney General's office on the return date of the subpoena, October 6. October 8, Justice George Tilzer signed an order to show cause in the New York State Supreme Court why both subpoenas should not be vacated or modified. Justice Tilzer also signed a stay order enjoining the Attorney General from taking "any steps or proceedings to compel the appearance" of Gilsten or the production of the North End's books. The motion was argued in Part I of the New York Supreme Court in October 10. On November 20, Justice Owen McGivern ordered Gilsten to appear at the Attorney General's office on November 28 and produce certain books and records of the North End Club.

On this latter date, Gilsten appeared and was examined under oath. Gilsten admitted, in his sworn testimony, that the North End Democratic Club acted as a distribution center for the anonymous "Communist Puppet" literature circulated in the Bronx.

Appendix "B"

Gilsten swore that he had no idea where the anonymous "Communist Puppet" literature was printed or how this material arrived at the North End Club. [It should be noted that during the interim investigation, we established that certain of this anonymous literature was ordered at the city-wide regular Democratic headquarters; printed by two New York City concerns; and that nine cartons of "Communist Puppet" kits were obtained by City Council man Thomas J. Cuite after a brief conference with Gilsten and his aides at the North End Club.]

Meager financial books and records were produced by Gilsten in response to the subpoena duces tecum. The North End Club's financial records consisted almost entirely of cancelled checks, bank statements and check stub books. However, a major portion of the club's 1961 primary campaign receipts and expenditures were in cash and non-recorded.

Gilsten acted as de facto treasurer for the 8th Assembly District's "Political Committee" (actually the North End Democratic Club) in the 1961 Democratic primary. He stated that he personally collected all monies contributed to the committee for the primary campaign and also supervised all expenditures.

As previously indicated, Article 13 of the Election Law makes the "treasurer" of a "political committee" responsible for maintaining certain financial records and filing prescribed statements with the Board of Elections and the Secretary of State. A record search showed that neither the "treasurer" nor any other person associated with the 8th Assembly District's "political committee" had filed a financial statement with the Secretary of State as required by § 324 of the Election Law.

This search also revealed a violation of § 325 of the Election Law in that no statement had been filed with the Secretary of State identifying the "treasurer" of the 8th A. D. "political committee".

Furthermore, § 325 as supplemented by § 327 of the Election Law requires the "treasurer" of a "political committee" to maintain a "detailed account" of all campaign receipts and expenditures, including a "receipted bill" stating the particulars of each expense. Gilsten's sworn examination revealed that he did not maintain ordinary business accounts and had no "receipted bills" for most expenses incurred.

The records produced by Gilsten established that Benjamin Gluckow, Secretary to Congressman Charles Buckley, filed a financial statement with the Board of Elections for the 8th A. D. "political committee' on September 28, 1961. However, this statement was contrary to the requirements of § 321 of the Election Law in that it was unsworn and failed to set forth the particulars prescribed by the statute.

No pre-primary financial statement was filed with the Board of Elections or the Secretary of State as required by § 323 of the Election Law.

(II)

STUDY RE: "WAGNER COMMITTEE"

The November 4 issue of the "Irish Echo", a weekly newspaper, situated at 1849 Broadway, New York County, contained a full page political advertisement which identified the sponsoring group as the "Independent Citizens Committee for Wagner, Screvane and Beame". No committee address or sponsoring member was listed.

This advertisement featured a headline which stated:

> "THE IRISH VOTER PUT KENNEDY IN THE WHITE HOUSE LET'S SEND WAGNER AND HIS TEAM BACK TO CITY HALL"

On November 5, John J. Gilhooley, the Republican candidate for City Controller, denounced the "Irish Echo" advertisement. He stated, "This Wagner advertisement is an insult to the Presidency of the United States; it is

an insult to President Kennedy himself who never made such minority appeals." Gilhooley exhorted the Mayor, "Don't drag us back into a time when 'we' meant a minority group in a racial or political or social ghetto."

Since the advertisement was not anonymous and appeared to accurately identify the sponsor as a "Wagner Committee", Gihooley's charge was not initially investigated by our staff. However, in response to an inquiry from the New York City Fair Campaign Practices Committee, Edward P. Cavanaugh, Mayor Wagner's campaign manager, stated that the sponsoring group was "unauthorized" and that Wagner headquarters "deplored this type of campaigning". At the request of the New York Fair Campaign Practices Committee, we thereupon initiated a study of this situation.

In the initial stages of this inquiry, we were informed by the editors of the "Irish Echo", that one John O'Donnell, a restaurant owner, whose home address was unknown, had ordered the ad. After considerable investigation we located O'Donnell, and he was examined under oath at the Attorney General's office concerning the make-up of the "Independent Citizens Committee for Wagner, Screvane and Beame". This portion of the examination proceeded as follows:

> "Q. You see at the bottom of that exhibit (advertisement in 'Irish Echo') there is 'Independent Citizens Committee for Wagner, Screvane and Beame'. Who are the people on that committee? A. Jim (Fitzpatrick) would know better than me.
>
> Q. Do you know? A. No. I'm a member of a committee in connection with that ad. I'm a member of a committee of three, I suppose you call it. That's the way it originated between Keating, Fitzpatrick and myself.

Q. As far as you know, the Committee is made up of Sean Keating, Fitzpatrick and yourself. A. Possibly.

Q. Don't you know? A. I know we were three of the members."

O'Donnell relayed that some time prior to the general election on November 7, 1961, he and James Fitzpatrick, a salesman, met with a long time friend, Sean Keating, then Assistant to the Mayor, at Wagner campaign headquarters in the Hotel Astor.

O'Donnell said that the purpose of this visit was to purchase tickets for a Wagner campaign banquet. However, during the course of the meeting, Fitzpatrick suggested that it would be "nice if we had a full page ad in the 'Irish Echo'" endorsing Mayor Wagner. Then, according to O'Donnell, Fitzpatrick volunteered to act as treasurer of the group; Keating wrote some innocuous advertising copy; and O'Donnell telephoned James A. Callahan, advertising agent of the "Irish Echo", to make preliminary arrangements for the advertisement.

O'Donnell said that at a later meeting in O'Donnell's restaurant, Callahan wrote the portion of the advertisement characterized by Gilhooley as a "minority appeal." O'Donnell stated that Callahan also "dreamt-up" the name to be given to the sponsoring group, "Independent Citizens Committee for Wagner, Screvane and Beame."

James Fitzpatrick, a district sales manager for a New York concern, gave sworn testimony in the "Wagner Committee" inquiry. Fitzpatrick stated that he had known Keating socially for about twenty years. His version of the meeting with Keating at the Hotel Astor was substantially the same as O'Donnell's. Fitzpatrick stated that his sole function with the committee was to act as treasurer.

Upon interview, James Callahan, the advertising agent for the "Irish Echo", stated that on October 26, 1961,

O'Donnell called him at the newspaper offices concerning a proposed political advertisement. Callahan said that he met the same day with O'Donnell and Fitzpatrick to make arrangements for the insertion of the ad in the "Irish Echo." Callahan's version of this meeting was brought out in the following questions and answers:

> "Q. Who suggested that the caption should be put on the advertisement 'Independent Citizens' Committee for Wagner, Screvane and Beame'? A. Well, I said, 'Now fellows, whose going to pay for this ad?' They said, 'We are.' I said 'O. K.' Now I had to have a source. They said 'Independent Citizens' Committee for Wagner, Screvane and Beam.'
>
> Q. Who said it? A. Both of them.
>
> Q. Mr. O'Donnell and Mr. Fitzpatrick? A. Yes."

Callahan further stated that he had written the "minority appeal" headline for the advertisement in order to give it "zip" and "a punch line."

Callahan said that the price of the ad was $400. John Grimes, the business manager of the "Irish Echo" stated that on December 1, Fitzpatrick paid for the advertisement with $395 in cash and a $5 check.

A search of the records of the Board of Elections and Secretary of State revealed that Fitzpatrick as "de facto treasurer" of an "informal committee for the placing of an ad in the 'Irish Echo' to support the re-election of Hon. Robert F. Wagner" (actually the so-called "Independent Citizens Committee for Wagner, Screvane and Beame") had filed the financial statements required of "political committees" under the Election Law. This statement identified eighteen persons who had allegedly contributed $350 and pledged $50 for the "Irish Echo" advertisement. The listed contributors included John J. O'Connor, a business associate of Keating's in the Fairways Travel Agency, 589 West 207th Street, New York County.

Further inquiry disclosed that the donors were all social or business friends of Keating, Fitzpatrick and O'Donnell. Several of the contributors stated that they made donations out of "friendship" rather than political conviction and that they were actually supporters of Lawrence Gerosa, a third-party candidate in the mayoralty race.

Sean Keating, former Assistant to the Mayor and now Regional Director of the United States Post Office was interviewed on November 15, 1961. Keating substantiated the statements of O'Donnell and Fitzpatrick concerning the initial meeting at the Hotel Astor. He denied any further active participation in the committee's work.

Keating defended the committee's ad, stating "I didn't see anything too outrageous. Just as long as they had Wagner, Beame and Screvane's name on there, that's what I was concerned with."

He said that even though the idea for sponsoring the "Irish Echo" advertisement originated in his office at Wagner headquarters, the committee was "unauthorized". He stated that Wagner Campaign Manager Cavanaugh "called me at my room and said 'who the hell put this ad in? Did we authorize that?' I said, 'No.' I said 'It was somebody else entirely.' So he was satisfied then because somebody had evidently brought it to his attention."

When Keating was asked whether he had ever made an inquiry concerning the full membership of the committee, he retorted, "No, because I knew that O'Donnell and 'Fitz' had taken the ad out and I assumed that they were the Independent Citizens because they're both independent and they're both citizens."

(III)

STUDY RE: "ANONYMOUS POSTERS"

During this investigation, we were informed that anonymous (but non-scurrilous) political posters were being

exhibited in the Yorkville and lower East Harlem areas of New York County. One of these posters depicted Carlos Rios, an "insurgent" primary candidate for Democratic Leader in the 10th Assembly District of New York County as a "puppet" of Assemblyman Mark Lane. Another anonymous poster showed Robert Low, an "insurgent" Democratic Councilman candidate in the 22nd Senatorial District as a "puppet" of Mayor Wagner. Both of these posters endorsed the candidacy of John J. Merli, the "regular" Democratic organization candidate in the District Leader and Councilman primaries.

A filed survey revealed that about thirty such anonymous posters were in evidence in these areas.

Further investigation revealed that Maxwell Mokut, Chairman of the "Independent Democrats for the Re-election of John J. Merli" had ordered and paid for these posters. Our investigation also established that David Schoer, the owner of Grenshaw Studios, 25 West 26th Street, New York County, drew the "puppet" cartoons featured on both posters; and that Henry Fuchs, a printer operating under the trade name of Sun Litho Art, 135 West 25th Street, New York County, printed "a thousand or two thousand" copies of these anonymous placards.

Upon examination, Fuchs stated that although he had printed political posters previously, "I don't put no identification on none of my printing."

Legislative Recommendations

We, in New York, are in the "horse and buggy age" in the consideration of legal weapons to combat *anonymous* "hate literature".

The great preponderance of campaign "hate literature" is ordered, printed and distributed in a furtive and conspiratorial manner. There is a compelling reason for this secrecy. The poltical leaders responsible for the dis-

semination of "hate literature" live in mortal fear of discovery by an aroused and enlightened electorate.

We believe that the most effective legal means for fighting hate peddlers is to remove their cloak of anonymity. If these persons are clearly identified, the voting public may avail itself of a potent weapon—retribution at the polls.

The constitutionality of the identification requirements of the Federal Corrupt Practices Act (which are substantially similar to those in the New York statute) has been upheld in *United States* v. *Scott* (U.S.D.C., Nor. Dak., 1961) not off. cit., 30 US.L.W. 2066, relying on *Communist Party* v. *S.A.C. Board* (1961), 367 U. S. 1.

Of course, the mere passage of a criminal statute requiring clear identification of the sponsors of campaign literature will not guarantee success. Those agencies responsible for the supervision of elections and prosecution of criminal offenders must be vigilant and dedicated. They must be ever ready to dig out those who print, distribute and finance anonymous campaign literature. And the voting public must be constantly alerted to such unfair campaign practices by a responsible and free press.

The only New York statute which even remotely bears on the problem is § 781-b of the Penal Law. This statute prohibits the *printing* of anonymous campaign circulars. However, Section 781-b is riddled with inequities and omissions. Thus, a political leader responsible for the *ordering* and *distributing* of anonymous campaign literature is immune from prosecution; anonymous political advertisements in newspapers, magazines and other periodicals are omitted from provisions of the statute; and anonymous circulars may be printed with impunity if they concern an election of a "party officer", such as a district leader.

It is true that the publisher of a written statement which defames an individual may be held criminally responsible (Penal Law, § 1341) and civilly liable. However, these

remedies are grossly inadequate where political candidates or public officials are the aggrieved parties. (See Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875.)

The weaknesses inherent in these statutes are compounded by the administration of the election laws in the City of New York. Our investigation indicated that the Board of Elections has not exercised certain of its statutory powers.

For example, under § 38 of the Election Law, the Board "and any of the commissioners thereof may require any person to attend before the board or a commissioner at the office of the board or a branch office and be examined by the board or a commissioner as to *any matter* in relation to which the board is charged with a duty under this chapter or concerning violations of this chapter, or of the provisions of the penal law relating to the elective franchise, and may issue subpoena therefor . . ." (Emphasis by our staff.) Yet, even where violations of the Election and Penal Laws were apparent (i.e., printing of anonymous "Communist Puppet" literature and failure of the North End Club to file a pre-primary financial statement) the Board undertook no inquiry.

In view of the enumerated defects in the law and its administration, we are making the following legislative recommendations to the Attorney General:

1. That § 781-b of the Penal Law be amended to prohibit any person from "printing, publishing or distributing" anonymous campaign literature or "causing" such literature "to be printed, published or distributed".

As it stands, Section 781-b neither deters nor punishes those primarily responsible for anonymous campaign literature—the financier and distributor. Under the proposed amendment, persons who print, finance or distribute anonymous campaign literature, could be criminally prosecuted.

2. That Section 781-b be amended to require that campaign literature bears both the name and address of the printer *and* the name and address of the specific person and organization which ordered the ad.

The present statute is phrased in the alternative, requiring identification of the printer *or* "the person and committee at whose instance" the circulars were printed. Hence the sponsors may remain anonymous and comply with the law.

3. That Section 781-b be amended to provide criminal penalties for the printing, ordering or distribution of anonymous literature in campaigns for "party" as well as "public" office.

The present section applies to "any election of public officers, (or) candidates for nomination for public office"; i.e., general and primary elections for Mayor, City Councilman, etc. The statute does not proscribe the printing of anonymous literature in campaigns for "party office", such as district leader.

4. That Section 781-b be amended to prohibit newspapers, magazines and other periodicals from printing or publishing campaign advertisements which do not identify the person and committee sponsoring the ad by name and address.

Under the present law, sponsors of such ads may remain anonymous or identify themselves in a nebulous and misleading manner.

Our inquiry disclosed that most newspapers and other periodicals circulated in the New York City area require proper identification of sponsors of political advertisements. However, this voluntary practice is not universal. As a result of vague sponsor identification, the "Irish Echo" ad was initially attributed to Wagner headquarters and provoked charges of official Democratic endorsement

of a "minority appeal". Only painstaking investigation disclosed that the committee name was apparently the product of an advertising agent's imagination and the sponsoring group operating independent of Wagner headquarters.

We believe that any laxity on the part of agencies supervising the conduct of elections cannot be cured by legislative mandate. In this area, the need is not for additional laws, but for officials with an awareness of their powers and responsibilities under existing statutes.

The following Special Assistant Attorneys General participated in this investigation of anonymous campaign literature and the preparation of our interim and final reports: Manuel Guerreiro; Alexander Holtzman; Donald A. Hopper; Allan A. Pines; William Rand, Jr.; and Walter Wager.

Three investigators aided our staff in the conduct of field investigations: John L. Cronin, New York State Police; Charles M. Eidel, New York State Police; and James Malone, Election Frauds Bureau, Office of the Attorney General.

We wish to express our appreciation to Attorney General Louis J. Lefkowitz and State Police Superintendent Arthur Cornelius, Jr. for placing these investigators at the disposal of our staff. In addition, the Attorney General generously provided office space and clerical aid.

We wish to note that the Attorney General scrupulously adhered to his pre-investigation pledge to allow our staff a completely "free hand" in the conduct of this inquiry.

APPENDIX I

§ 781-b—Penal Law

"§ 781-b. *Printing or other reproduction of certain political literature.* No person shall print or reproduce in quantity by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the State Constitution whether in favor of or against such political party candidate, committee, person, proposition or amendment to the State Constitution, in connection with any election of public officers, candidates for nomination for public office, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof or of the person and committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed or reproduced, and no person nor committee shall so print or reproduce for himself or itself any such handbill, pamphlet, circular, post card, placard or letter without also so printing or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee, at whose instance or request a handbill, pamphlet, circular, postcard, placard or letter is printed or reproduced by such principal, and does not include a person working for or employed by such a principal."

APPENDIX II

§§ 776 and 783—Penal Law

"§ 776. *Failure to file statement of receipts, expenditures and contributions.* Any candidate for election to public office, or any candidate for nomination to public office at a primary election, or any treasurer of a political committee as defined by the election law, who neglects to file, as required by the election law, a statement of receipts, expenditures and contributions shall be guilty of a misdemanor."

"§ 783. *Crimes against the elective franchise not otherwise provided for.* Any person who knowingly and wilfully violates any provision of chapter seventeen of the consolidated laws of this state, known as the election law, which violation is not specifically covered by any of the previous sections of this article is guilty of a misdemeanor."

IN THE

Supreme Court of the United States

October Term, 1968.

No. 370

ELLIOT GOLDEN, as Acting District Attorney of the County of Kings,

Appellant,

against

SANFORD ZWICKLER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 RE 2-6978—1968

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BRIEF FOR APPELLEE.

Statutes Involved.

To the portion of the statute set forth in Brief for Appellant, the following section is added:

> "Section 458. Penalty.
>
> "Any person convicted of a misdemeanor under this article shall for a first offense be punished by imprisonment for not more than one year, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or both such fine and imprisonment. *Any person convicted of a misdemeanor under this article for a second or subsequent offense shall be guilty of a felony.*" (Emphasis supplied.)

Questions Presented.

1. Is Section 457 of the Election Law of New York (formerly numbered Section 781-b of the Penal Law of New York) repugnant to the First Amendment to the Constitution of the United States in that it acts as an invalid restraint on expression?

2. Did not the District Court properly exercise its power to render a declaratory judgment in this case?

3. Did the District Court abuse its discretionary equitable powers by granting injunctive relief, incidental to its declaratory judgment?

Statement of the Case.

The appellee, Zwickler, commenced this action on April 22, 1966, for a declaratory judgment and injunction in the United States District Court for the Southern District of New York. He alleged that he had been previously convicted for a violation of Section 781-b of the Penal Law of New York, now renumbered as Section 457 of the Election Law of New York, in that he had distributed an anonymous leaflet in quantity, commenting upon a candidate for the Congress of the United States. Upon his appeal, his conviction was reversed because of the insufficiency of the evidence. Thereafter, the appellant as district attorney pursued the case to the Court of Appeals, the highest court in New York, which affirmed the reversal of the conviction, without opinion, *People v. Zwickler,* 16 N. Y. 2d 1069. The appellee, however, wishes to renew the distribution by him of the anonymous leaflet. But he was mindful of his previous conviction and his involvement in a prior prosecution all the way to the Court of Appeals.

Zwickler was also mindful that under the statute, a second conviction is a felony, with all its attendant disabilities in New York. He therefore fears to make distribution. He will not risk another prosecution and has thus been prevented from making distribution. Because of this fear he refrained from distribution during the 1966 election and while this litigation was pending. His interest in expressing himself is thus chilled by the perils and difficulties associated with such expression.

He also alleged that the appellant is a diligent prosecutor who had previously pursued him to the Court of Appeals and intends to again prosecute him and that because of the threats of prosecution of him, the appellee fears to exercise his right of expression by the distribution of the anonymous leaflet.

Zwickler alleges that he desires to distribute the leaflet in large quantities during the 1966 election (the complaint was filed in April, 1966) and subsequent election campaigns or in connection with the election of party officials, nominations for public office and party position that may occur *after* 1966.

He therefore prayed that the court declare Section 781-b to be repugnant to the Construction of the United States and to enjoin its enforcement.

The appellee moved for an interlocutory injunction and for the convening of a three-judge statutory court. The appellant moved to dismiss the complaint on the ground that it did not state a claim upon which relief could be granted.

The motion to convene a three-judge court was granted. It was convened and a hearing was held.

That court by a vote of 2-1 denied relief to the appellee and granted appellant's motion to dismiss the amended complaint. At the hearing counsel stipulated that the

court should treat the hearing as one for final judgment (A. 25). Indeed, the facts are matters of public record (*People v. Zwickler,* 16 N. Y. 2d 1069).

This court reversed the judgment of the District Court and remanded the case, *Zwickler v. Koota,* 389 U. S. 241.

Upon remand the District Court requested counsel to furnish additional briefs. No further hearings were held. It should be remembered in this connection that counsel had stipulated to treat the hearing for a preliminary injunction as one for a final judgment (A. 25).

The District Court by a unanimous vote, granted a final judgment (again attention to the stipulation of counsel as to finality is invited, A. 25 and which is recited in the judgment, A. 59), declaring the statute to be repugnant to the Constitution of the United States in that it abridges the rights secured to Zwickler under the First Amendment to the Supreme Court of the United States. The court also enjoined the district attorney from arresting or prosecuting the appellee under the statute.

Mr. Justice Harlan on July 8, 1968, granted an application made by the appellant for a stay over the objection of Zwickler that his First Amendment rights would be impaired if he could not make distribution during the election campaign of 1968.

Summary of Argument.

1. The appellee argues that the statute is repugnant to free speech protections of the Constitution in several respects:

(a) Since the record shows that the statute is directed against scurrilous and false campaign literature, appellee addresses his arguments in that light. The history of anonymous literature before the adoption of the Con-

stitution established its protection as part of the free expression protected by the Bill of Rights. Historical antecedents show that a tremendous amount of literature, both scurrilous and false, was written before the adoption of the Constitution. Indeed, even the Framers participated in anonymous writings before and after the adoption.

(b) This court has already held that speakers need not identify themselves. It follows, that writers have the same protection.

(c) Since the signature or non-signature is part of the manner of expression, the restrictions against the censorship of ideas apply, without any need for discovering a motivation for anonymity.

(d) If motivation is necessary, it can be found in the desire to escape reprisal, or for reducing resistance to novel ideas, or because of a prejudice against a certain writer or type of writer, or as in the case of *The Federalist*, the authors desired an objective appraisal. There are many others.

(e) The lack of a signature in itself is no evil. If there be an evil, it is only in the contents of the writing. The lack of a signature only provides an inconvenience for identifying the author, if identification is necessary.

(f) The contention of the appellant that it is necessary for effective administration of the election laws is far from the mark. The demonstration of a connection is most thin. Even if plausible, there is no justification for the denial of First Amendment rights to the public in general, merely to provide a check on election activity.

(g) In any event, the statute, as it reads, could be even used against literature that does have constitutional protection. It could apply, for example, to pamphlets that

treat constitutional propositions and thus draw within its ambit, such literature as *The Federalist.*

2. The appellee contends that the District Court was correct in its two decisions (the first, when it denied Zwickler relief, and the other upon remand) that a case and controversy exists between the parties. The appellee shows that the District Court is supported by the *Evers* case which decided a case and controversy existed under similar circumstances. The appellee also demonstrates that the recent *Carroll* case decided by this court is dispositive of any issue of mootness. In sum, since Zwickler has been discouraged from making distribution of anonymous leaflets (which he wishes to do in connection with an election or party function), because of the statute, the very existence of the statute is a chill upon his exercise of his right of expression. The existence of this desire and its frustration by the statute is a present and vital controversy.

3. The appellee also urges that the appellant has not shown any abuse of discretion by the District Court in granting injunctive relief, incidental to its declaration of the statute's invalidity. The appellee on the contrary, contends that such relief is desirable to render the judgment more efficient.

POINT I.

The statute is repugnant to the first amendment to the Constitution of the United States.

Preliminarily, appellee urges that the prevalence of a statute similar to New York's in 36 states, does not render this statute immune from attack as "the overwhelming public policy of the Nation". (Justice Clark dissenting in *Talley v. California,* 362 U. S. 60, page 70, questionable as

may be the observation that the public policy of the Nation is thus established, or whether the force of numbers withstands constitutional infirmity). In *Winters v. New York,* 333 U. S. 507, 520, in the dissenting opinion, the statute under attack was 60 years old and 20 states had similar statutes. See, *People v. Fenster,* 20 N. Y. 2d 309.

The appellee contends that anonymous publications directed at political figures and concerning political matters, had a long history of acceptance for centuries before the adoption of the Constitution. Indeed, even the Framers were active with anonymous political writings before and *after* the adoption of the Constitution. That alone is an indication that the constitutional protection of expression included anonymity. Moreover, even without such historical reference, anonymity of publication is as much protected as the speech itself. No government should have a right to interfere with a publication by commanding a signature no more than to command the style of writing or the paragraphing, no more than it could demand that a speaker on a platform cut off his whiskers so that he could be identified, undisguised. The lack of a signature is as part of the literary effort as any other part of it, since the author chooses to express himself in that fashion.

Since history shows that the political literature covered by the statute has over the centuries been attended with scurrility and untruthfulness, the statute proscribes what had been permitted before and after the adoption of the Constitution.

It should be noted that at the hearing before the District Court, the attorney general urged in an affidavit (A. 16) and argument, that the statute is not vague, because the history of the legislation shows that the statute's prohibitions are directed against untruthful or scurrilous campaign literature. Indeed, a trial court so construed the statute (*People v. LoPinto,* 1966, 49 Misc. 2d 997).

Analysis of the statute discloses that it is directed against anonymous pamphlets and leaflets when disseminated in connection with:

(1) any election of public officers

(2) party officials

(3) candidates for nomination for public office

(4) party position

(5) proposition or amendment to the state constitution; concerning the following:

(a) a political party

(b) candidates

(c) committee

(d) person

(e) proposition to the state constitution

(f) amendment to the state constitution.

A history of the legislation and its enforcement appears in the opinion of the District Court (A. 32).

The History Alone of Anonyma Shows That the First Amendment Protects It.

1. In *Roth v. United*, 354 U. S. 476 at 482-485, this court used historical antecedents to support the implication it drew, that obscene publications are an exception to the guarantees of the freedom of the press, although no words are found in the Constitution that state such an exception. The same method is conversely appropriate to demonstrate likewise that historically, anonymous political literature was the accepted mode of publishing and was used by the Framers themselves, both before and after the adoption of the Constitution.

The catalog of anonymous literature is a long one (see *Talley v. California,* 362 U. S. 60). An idea of its volume can be gained from the nine (9) thick volumes of Halkett & Laing, *Dictionary of Anonymous and Pseudonymous English Literature* (Oliver & Boyd, London 1926). Taylor & Mosher, *The Biographical History of Anonymous and Pseudonyma,* Chicago 1951, also contains several pages beginning at 280, listing numerous dictionaries and other guides to anonymous literature of countries all over the world; Bleyer, *Main Currents in the History of American Journalism;* 1 Encyclopedia Britannica (1968 edition) 1013.

See also, Stonehill, Charles A., *Anonyma and Pseudonyma,* 4 volumes (1927); Barbier, *Dictionnaire des Ouvrages Anonymes;* Force, *Who is Who;* Hayne, *Pseudonyms and Authors;* Partridge, *The Most Remarkable Echo in the World;* Solberg, *Authors of Anonymous Articles Indexed in Poole;* Wheeler, *An Explanatory and Pronouncing Dictionary of the Noted Names in Fiction, Including also Familiar Pseudonyma*; Cushing, *Anonyma.*

An example of the pre-Constitution anonymous writings is to be found in Bleyer, *op. cit.,* in which it is reported that the letters of Junius and the letters of Cato (1720) were anonymous scurrilous political tracts, Bleyer, pages 23, 79. The Stamp Act was opposed by anonymous literature, Bleyer, page 79.

One of the greatest satires on public officials and public life is *Gulliver's Travels.* It was issued originally as an anonymous document (Halkett & Laing, *op. cit.,* Volume 1, page 385) under the title, *"The Travels of Lemuel Gulliver,"* out of fear of the censorship laws of England, against which the First Amendment now stands as a bulwark, *Garrison v. Louisiana,* 379 U. S. 64 (see introduction by Shane Leslie to "The Travels of Lemuel Gulliver" by Jonathan Swift, The Limited Editions Club, 1929).

Paine, wrote his "Common Sense" anonymously (Halkett & Laing, *op. cit.*, 385). It was a powerful and scurrilous attack on political position at the time. Bleyer reports (p. 91): "This pamphlet more than any single piece of writing, crystallized in the popular mind the idea of independence for the colonies."

The reasons for anonymity were many. Taylor & Mosher, *op. cit.* 82 *et seq.* A prominent one was fear of reprisal. The forms of reprisals were many, including blacklisting. 1 Encyclopedia Britannica, *supra.*

Bleyer also reveals (Chaper II, Early Colonial Newspapers, 1690-1750), page 56, that James Franklin published a newspaper for which he sought anonymous writings:

> "To expose the Vices and Follies of Persons of all Ranks and Degrees under *feigned Names,* is that no honest Man will object against; and this the Publisher (by the Assistance of his Correspondents) is resolv'd to pursue, without Fear of, or Affection to any Man." (Emphasis supplied.)

His brother, Benjamin Franklin, contributed to it anonymously, Bleyer, page 56. Indeed, Franklin wrote under numerous pseudonyms, Ford, P. L.—*Franklin Bibliography,* Chap. IV; Taylor & Mosher, *op. cit.* 169.

After the Constitution, anonymous scurrilous writings continued even among the Framers. Hamilton attacked Jefferson. Bleyer, *op. cit.* (Chaper IV, Beginnings of the Political Press, pp. 100-129), page 110. Washington was also attacked, page 116.

Of course, *The Federalist,* which dealt with constitutional propositions, was anonymous or at least pseudonymous. Ford, *The Authorship of the Federalist,* American Historical Review, Vol. II, pp. 675, 443; Bancroft, History of the Forming of the Constitution of the United States, Vol. 2, p. 336.

Closer to our statute is the anonymous political literature Abraham Lincoln broadcast:

> "Two days before the August 7 election a handbill, *written but not signed* by Lincoln, was given out over the town. It recited a series of alleged facts about the ten acres claimed by Mrs. Anderson and an assignment of judgment by Anderson to Adams being freshly handwritten in what appeared to be the handwriting of Adams. In effect, Lincoln was publicly accusing Adams of being a forger and swindler, this without a trial, with no evidence heard from the accused, and witnesses cited from only one side. *It seemed Lincoln expected this handbill to blast Adams out of politics.* He guessed wrong. In the August 7 election Adams won by 1,025 votes against 792 for Henry." (Emphasis supplied.)
>
> Carl Sandburg, "Abraham Lincoln", page 61 (one-volume edition, Harcourt Brace & World Inc. 1954).

It is a common observation that new ideas are resisted because of their novelty. To succeed in winning support for them it is often necessary to introduce them anonymously. *The Federalist* is an excellent example of the use of pseudonyms to gain support for constitutional propositions, on objective grounds. The authors sought to have their propositions accepted, without overwhelming the population by their eminence.

2. So much for the historical support for the contention that the statute infringes upon free expression.

We turn to precedents in this court which support Zwickler's contentions:

We start with the question whether a person who wishes to communicate *with the public at large* on matters of general public interest, such as political candidates or constitutional propositions, must identify himself. To that question, this court has already given the answer

with respect to speakers. This court, in *Thomas v. Collins,* 323 U. S. 516, has held that a requirement that a speaker identify himself is an infringement on the right of expression. In that case, a speaker was held in contempt for having spoken without complying with a court order issued under a statute that required him first to register, so that he might be identified. This court struck down that law, saying:

> "As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of brave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or other to assemble and discuss their affairs and to enlist the support of others. If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved then exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

Therefore, a speaker may rise on a platform without any identification, and even speak untruthfully or scurrilously. *Terminiello v. Chicago,* 337 U. S. 1. But the point is that he does not have to identify himself.

In which way could there be a distinction between an oral speaker and a written pamphlet? It had been urged that a speaker could be identified by his appearance. But if the speaker is a stranger from afar to the audience, or is disguised with whiskers and non-descript clothing, so that even his mother could not recognize him, as is so fashionable today among speakers, then the distinction completely evaporates, and the argument fails.

Basically, the entire concept of free speech rests on the assumption derived from centuries of scholarship and philosophy, that truth rests on its own supports for acceptance, and not on the name of its utterer. Holmes, J. in *Abrams v. United States,* 250 U. S. 616, Brandeis, J. in *Whitney v. California,* 274 U. S. 357, 375, Black, J. in *Adler v. Board of Education,* 342 U. S. 485, 496.

Justice Black in *Talley v. California,* 362 U. S. 60 at page 64, succinctly put it:

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which the government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and

fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

"We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. *Bates v. Little Rock*, 361 U. S. 516; *N. A. A. C. P. v. Albama*, 357 U. S. 449, 462. The reason for those holding was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it, like the Griffin, Georgia, ordinance, is void on its face."

See also, the concurring opinion of Justices Black and Douglas in *United States v. Rumely*, 345 U. S. 41, 56. In that case, Rumely was convicted of contempt of Congress for having refused to disclose to a congressional committee, the names of the purchasers of his books which he had on sale.

3. If an author were compelled to disclose his name in every case, it might deter him from publishing what may be of supreme importance to the public, especially, as in this case, concerning political candidates and political ideas. It is this deterrence which acts as a restraint on

ideas and thus violates the First Amendment. This, in addition to the argument of history, should answer any query (see Justice Clark dissenting in *Talley*, p. 70) as to where in the Constitution is to be found any edict against anonymous publications. The query can likewise be answered by *Roth, supra,* for there, obscenity was found to be unprotected by the Constitution, although the text did not state so. See *ante,* page 8.

Nor is it necessary that the distributor, as his burden, furnish proof of economic reprisal, loss of employment or physical danger. *It is sufficient that reprisal is inherent in restricting dissemination.* The potentiality of reprisal is not a matter of fact, to be proved in every case. It is a fact assumed by reason, to be a matter of law as a basis for permitting anonymity. See Justice Black in *Talley v. California,* 362 U. S. 60, 64:

> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' *Lovell v. Griffin,* 303 U. S. at 452."

What the First Amendment aims at is the chilling effect of the fear of dissemination that would result from a compelled disclosure.

See, *The Constitutional Right to Anonymity: Free Speech, Disclosure and The Devil,* 70 Yale Law Journal 1084, for a comprehensive discussion of the subject. See also, *Anonymity: An Emerging Fundamental Right,* 36 Indiana Law Journal 306.

There still remains to be discussed what the effect false anonymous and scurrilous statements would have on anonymous distribution. Although the history of anonyma shows that the Constitution protects such writings

even if they do not tend to restrict authorship, nevertheless, it is appropriate to consider such effect.

In the realm of speech, this court has been careful to protect the content of speech, even if the speech is obnoxious to the audience. *Lovell v. Griffin,* 303 U. S. 444; *Jameson v. Texas,* 318 U. S. 413; *West Virginia Board of Education v. Barnette,* 318 U. S. 624; *Kingsley International Pictures v. Board of Regent,* 360 U. S. 64; *Staub v. Baxley,* 355 U. S. 317; *Speiser v. Randall,* 357 U. S. 513.

This court in *Talley v. California,* 362 U. S. 60, held that a statute which forbade the dissemination of anonymous pamphlets was repugnant to the Constitution. There, the statute did not isolate the type of anonymous literature forbidden (see also, *People v. Mishkin,* 17 A. D. 2d 243, affd. 15 N. Y. 2d 671, and the subsequent amendment of the statute by the Laws of 1963, Chapter 703).

In *Talley*, a Los Angeles ordinance forbade distribution of handbills which did not have printed on their face the name and address of the printer and the person who caused distribution and sponsorship of the handbill. The defendant was arrested for violating the ordinance in that he had distributed a handbill of the National Consumers Mobilization which urged a boycott against certain businessmen who were named, because they carried products of manufacturers who would not offer equal employment to Negroes, Mexicans and Orientals. The Appellate Department of the Superior Court of the County of Los Angeles rejected defendant's contention that the ordinance invaded freedom of speech under the Fourteenth and First Amendments. This court held the ordinance unconstitutional, as too broad and in no way limited to pamphlets whose contents were obscene or offensive to public morals or advocated unlawful conduct.

This court held that the statute was not limited either by its text or legislative history to a means of identifying those responsible for fraud and libel. Therefore, it did not pass on the validity of an ordinance limited to prevent those evils. "The ordinance bars all handbills under all circumstances anywhere."

Here, the statute is more particularized. From the analysis (*ante*, p. 8), it is readily discernible that the subject matter of the statute is that most readily protected by the First Amendment. The subjects are candidates for public office, political parties and amendments to the state constitution. Of all discussions within the intendment of free speech, these are the most favored!

Yet, this statute is specific in condemning anonymous criticisim of persons of public interest, in a manner akin to seditious libel. As construed, the operation of the statute is to create a restraint which has the effect of a seditious libel statute.

In a recent series of cases, this court consistently followed and reaffirmed the principle, that disclosure cannot be compelled when reprisals or injury will likely result. *Bates v. Little Rock*, 361 U. S. 516, and *National Association for the Advancement of Colored People v. Alabama*, 357 U. S. 449, in which the court held that persons associated to disseminate ideas could not be compelled to identify the members; *Shelton v. Tucker*, 364 U. S. 479, where an individual teacher, as distinguished from the group in the *Bates* and *NAACP* cases, could not be required to identify organizations in which he was a member. *Lamont v. Postmaster General*, 381 U. S. 301, in which the Court struck the requirement that a recipient of a publication disclose himself.

4. The force of these decisions is not attenuated by older decisions, such as *Lewis Publishing Co. v. Morgan*, 229

U. S. 288, where disclosure was required for the exercise of the privilege of the use of second-class mail; and *United States v. Harriss,* 347 U. S. 612, requiring identification of lobbyists before Congress. These cases can be distinguished: the *Lewis* case in that the privilege might be renounced, as the price, though a heavy one, by one who sought anonymity. The periodical could resort to anonymity, without suppression, by government fiat, if it wished to pay the price. An entirely different case would arise if all anonymous mailings were barred. And it should not be overlooked that even periodicals enjoying second-class mail privileges, nevertheless, carry articles and letters that are anonymous. The *Harriss* case deals with a special situation relating to Congress. It does not compel disclosure to the public in general, but merely to members of Congress. In any event, if these cases cannot be so distinguished, it can be said they have been disregarded or overruled *sub silentio* by the subsequent decisions; see, e. g., *United States v. Rumely,* 345 U. S. 41.

5. In any event, the content of the literature (falsity and scurrility) is the evil, then argument to deal directly with that evil is appropriate. But such issue should not be befuddled with anonymity, which is only identification. Anonymity could only prove as a nuisance toward ascertaining the utterer, a nuisance akin to the task of an investigator in any case where identity is sought. But should such a nuisance weight sufficiently to abolish the right and benefits of anonymity that has been the history of literature from time immemorial? The District Court held the price to be too high (A. 49).

This court in *Schneider v. New Jersey,* 308 U. S. 147, had before it the question of the balancing of interests, when faced with the question whether distribution of pamphlets in the streets are to be free as against the

nuisance of the potential littering of the streets. This court voted in favor of eliminating restraints on speech as against the possible nuisance of the streets becoming littered.

In this connection it should not be overlooked that the use of pseudonyms and false names creates as much of a nuisance of attempted detection as does the complete absence of a name. So that the remedy sought by the statute (as appellee asserted, A. 16) as an instrument to locate an untruthful or scurrilous author is illusory.

The reports that the appellant annexed to his brief (pp. 40-71, App. A and App. B), serve only to make clear what has just been stated. Those reports are not in the record, nor as any part of appellant's proof. Undoubtedly, because the appellant believes they aid him they were inserted. The reports show however that such literature could be distributed, with or without a signature. The authorship of the pamphlets was readily admitted. Yet they were scurrilous. The reports also show that when identification of the source was sought, the results were obtained without much effort. What deserves emphasis however is, that although the source was identified, the scurrility nevertheless remained. What did identification achieve? Nothing, but satisfy a curiosity or a fierce resentment (Brief, p. 69). They also illustrate that scurrilous information is carried by word of mouth (Brief, p. 54) and that a speaker cannot readily be identified; nor is he subject to any statutory restriction. The same type of scurrility could readily be scrawled anonymously on walls.

As to any argument that it is necessary there be disclosure of literature distributed on the eve of an election, so that a candidate may be in a position to rebut, the answer is that the argument is confused. Dis-

closure of identity is not a necessary part of answering back. Anonymity has nothing to do with the ability of a candidate to answer back. The candidate could answer back whether the author of obnoxious material is disclosed or not. This contention is fortified by the decision in *Mills v. Alabama,* 384 U. S. 214, where the Court held unconstitutional, a statute which forbade comment on election day, if it urged people to vote in a particular manner.

Insofar as the recognized evil of fraud or palming-off is concerned, compelled disclosure is not the remedy. If, for example, a Democratic candidate should broadcast a leaflet falsely signed as by a Republican with the aim of injuring the Republican candidate, the remedy is not to require disclosure of the author. The remedy is by sanctions directly against the fraud. Punishment for anonymity provides no remedy for the supposed evil. If the aim of a statute is to eliminate that evil, it is far off target! A falsity can be stated with or without the name of the author affixed.

It is not amiss to observe that concern about the identity of a perpetrator of seditious libel or untrue statements has been considerably watered down by this court's recent pronouncements in *New York Times v. Sullivan,* 376 U. S. 254; *Garrison v. Louisiana,* 379 U. S. 64; *Time, Inc., v. Hill,* 385 U. S. 374; *Mills v. Alabama,* 384 U. S. 214. Those cases have limited the instances in which an action for a false, libelous or untrue statement may be brought; so that the practical operation of the New York statute as an instrument to aid libel actions, at best, is minimal. And if the minimal may be minimized, it should also be pointed out (as did the District Court, A. 41) that the laws of criminal libel were repealed in New York, effective September 1, 1967.

6. The statute under attack here, if adjudged valid with respect to false and scurrilous statements would only

serve to involve the courts in the dark labyrinths of determining the contents and character of a publication before it can approve anonymity.

But as the District Court put it so well, that before the judiciary makes a determination in a given case of permissible anonymity, the chilling effect on publication has already occurred. The courts in such a case would come into play only *after* a given event. There could be no determination of permissible anonymity before the publication. There could be no declaratory judgment of permissible anonymity, because the plaintiff in such a case would at some stage be revealed and therefore, the effect would be to discourage resort to such a remedy. But the chilling effect of the statute upon the author would remain.

This case furnishes an excellent illustration. Zwickler had previously been arrested and prosecuted through the New York courts, all the way to the New York Court of Appeals. To put it mildly, he became [illegible]ed in his enthusiasm about future distribution. Whether it can be said to be a "scurrilous" or "malicious" publication raises several serious questions, and since "malice" is so subjective, the problems multiply (see the concurring opinions of Justice Black and Justice Goldberg in the *New York Times* case as to the inherent difficulty of assessing "malice" of a publication). Whose malice is involved? Is it that of the anonymous author or of Zwickler, the distributor? Assuming the author had malice, but Zwickler was innocent and public-spirited, may the leaflet be distributed anonymously? How can Zwickler know, *in advance* of distribution whether he falls within the statute —or that the publication does? Under the circumstances, what is Zwickler to do about ascertaining his right to distribute anonymously? The answer is quite clear: he is discouraged and will not take the chance of distribution.

Zwickler's case undoubtedly is also the case of many others. There cannot be freedom to distribute if it is accompanied with fear. Therefore, the courts should not concern themselves with the question of whether the publication is true or false or scurrilous, as a price for publishing anonymously. Removal of the hazard of distribution is indispensable to freedom of the press.

The Statute is Invalid as to Literature That is Not Scurrilous or False.

Up to this point we have accepted the construction of the statute which appellant's counsel argued and supported with proof (A. 16). We submit, appellee has demonstrated that the statute as so construed is repugnant to the Constitution. It is invalid as to all anonymous political publications set forth in the statute.

It is clear that the statute is directed at political leaflets distributed in connection with certain events. The type of publication and the events are set forth with particularity in the statute. We submit, that the arguments appellee addressed to scurrilous and untrue publications, hold with even greater force with respect to the non-scurrilous and truthful types.* Those arguments produce the conclusion that the statute is *a fortiori* invalid, if for no other reason than that under a broad reading of

*The *Federalist*, for example, deals with constitutioual propositions. Had the statute under attack been in effect in the days of Hamilton and Jay, New York lawyers, serious difficulty would have been their lot, because of their multiple contributions to *The Federalist*, in pamphlet form, which they published anonymously under the title of "An Address to the People of the State of New York," 12 Encyclopedia Britannica, page 981, "John Jay." Under the statute, a second conviction is a felony, which to a lawyer means automatic disbarment (Judiciary Law, Section 88[3]).

the statute, even a highly laudatory publication would be proscribed.

The appellant contends that the purity is attained by enabling public officials to discover party expenditures. The District Court answered that theory (A. 41-42).

The District Court responded that the general public's right of expression is not to be impaired because the statute's purpose of gaining information about violators of expenditure provision. And the District Court quoted from *N.A.A.C.P. v. Alabama,* 357 U. S. 449, 461, in support of its conclusion (A. 45).

The appellant also is of the opinion that anonymity must be abolished because the public has "the right to know." What this "right to know" is, is difficult to discover. It is a phrase that has wide currency. But the source of its authority is not to be discovered. It is not a right found in the Constitution. The Constitution speaks only of a right of expression.

A "right to know" dangles in space, as one readily learns by asking, "the right to know *what?*" To answer, "the right to know the name of an author" begs the whole question. Therefore, the "right to know" cliché is not helpful.

The appellant's argument that a signature is necessary because people are emotional and are impressed by the printed word, the answer is that appellant takes a very pessimistic but unwarranted view of the electorate. It is a sad state for a democracy if its voters are as simple as appellant describes them. Fortunately, voters are not so naive nor as impressionable. Voters usually have their own mind. Some are impressed by what anonymous editors of newspapers suggest as their vote; others are impressed by non-anonymous figures. But on the whole, people vote as their sum total personality—a confluence of all forces—urges. See for example, the item about Abraham

Lincoln's anonymous effort to defeat a candidate and how unsuccessful it was (*ante*, p. 11).

The various positions taken by the appellant (Brief for Appellant, 16, 18, 21, 27) merely emphasizes the uncertainty of the grounds suggested in support of the statute. Appellant's contentions however can be reduced to a theory which holds: if a governmental purpose is served by a statute that impairs expression, then the statute is compatible with the Constitution. But such a theory overlooks two factors: First, that the decisions of this court, except in obscenity cases, completely negate such a contention; and secondly, that every attempt at state intrusion into speech seeks correction of an alleged evil in the cause of some public benefit. The District Court on this score, rejected the appellant's proffered justifications of the statute (A. 41-45).

POINT II.

A case and controversy exists; the District Court properly exercised its discretion to grant a declaratory judgment.

A final declaratory judgment in favor of Zwickler was granted by the District Court. Finality was reached because no disputed issues of fact appeared from the allegations in the complaint. Counsel for both sides had stipulated at the hearing of the application for a temporary injunction on June 9, 1966, that the court treat the application as one for final judgment. An excerpt from that hearing appears in the record (A. 25), which ends as follows:

> "Judge Kaufman: In other words, we are to consider this the hearing on the application for a permanent injunction.
> "Mr. Redfield: Yes, sir."

The District Court has at no stage doubted that a case or controversy exists between the parties. Even in its earlier decision, in which it abstained from exercising equitable jurisdiction, it held, 261 F. Supp. 985, 989:

> "The complaint states a claim under the Civil Rights Act, 28 U. S. C. §1343(4), since it alleges a deprivation of a right guaranteed by the Fourteenth Amendment. *It alleges a case or controversy which is within the adjudicatory power of this court. Douglas v. Jeanette,* 319 U. S. 157, 162, 63 S. Ct. 877, 880 (1943)." (Emphasis supplied.)

Upon remand, the District Court was again of the opinion that a case or controversy exists (A. 29-37). The court held that the chill upon Zwickler exercising his First Amendment rights is continuous. The statute has been used recently to prosecute persons including Zwickler, and the statute has been amended several times in recent years, thus demonstrating its viability.

That this appeal involves a case or controversy is readily deduced from a reading of *Evers v. Dwyer,* 358 U. S. 202. In that case, Evers attempted to sit in any empty seat of his choice in a segregated bus. He was told by the conductor to sit only in a seat designated for colored persons, as required by local ordinance. He was threatened with arrest for failure to comply. Instead of complying, he left the bus. He instituted an action to have the ordinance declared repugnant to the Constitution of the United States and for an injunction against its enforcement. Against a contention that no case or controversy existed, this court held that the facts did state a case and controversy, even in the face of a contention that the plaintiff had purposely prearranged his behavior for the very purpose of instigating a test case of the ordinance.

The District Court (A. 52, 33-37) disposed of appellant's attempt (Appellant's Brief, pp. 32-37), in the face of his stipulation that no facts are at issue, to smuggle a meaningless and unauthenticated circular into the record, to contend that Zwickler provoked his prosecution, and to impugn Zwickler's sincerity that he wishes to make distribution. Indeed, the *Evers* case makes all such speculation immaterial.

Zwickler's desire to distribute in the future is the same as Evers' desire to sit in the future in any vacant seat in a bus, without discrimination.

The fact that *Evers* was decided in the Fifth Circuit does not distinguish its force from the present case. Zwickler is stronger than *Evers* because Evers was not arrested, whereas Zwickler was arrested, arraigned, tried, convicted, won an appeal, and then was pursued by the defendant with an appeal to the highest court in the State.

Evers and Zwickler have a common core, which goes to the essence of the jurisdiction of the court upon an application for a declaratory judgment, and that is, that neither of them wished to be martyrs in order to assert their constitutional rights. Since the very purpose of an action for a declaratory judgment is to avoid perils, it is most appropriate when martyrdom would be the lot of one who disobeyed the penal law. And it is most appropriate where First Amendment rights are involved, as this court in this very case unanimously ordered.

Indeed, Borchard, the architect of the modern law of declaratory judgment states the following in his "Declaratory Judgments," Second Edition, at page 66:

> "Criminal Penalties. The danger of a criminal penalty attached by law to the performance of an act affords those affected the necessary legal interest in a judgment raising the issue of validity,

> immunity or status. The threat to enforce the law seems hardly necessary, for public officials are presumed to do their duty. The plaintiff need only show that his position is jeopardized by the statute * * *. He may challenge the statute before he commits the forbidden and incurs the penalty."

In the previous argument for the District Attorney in this court (see, Brief for Appellee, O. T. 1966, No. 81), it was not contended that no case or controversy is stated. It was argued only that the District Court was correct in abstaining under *Douglas v. Jeanette.* The defendant also argued that because the State of New York provides a remedy for a declaratory judgment, the District Court was correct in abstaining, citing *Bunis v. Conway,* 17 A. D. 2d 207, app. dism. 12 N. Y. 2d 882; *The Bookcase, Inc., v. Broderick,* 49 Misc. 2d 351, affirmed on the merits upon a direct appeal allowed under New York law where the sole issue is the validity of a statute under the Constitution, 18 N. Y. 2d 71; also *Fenster v. Leary,* 20 N. Y. 2d 309. Those cases hold that under New York law, declaratory judgment may be granted. This court stated however in this case that the plaintiff is not barred from relief in a federal District Court because of the concurrent remedy in the state court; that Congress had also provided for a remedy in the federal courts.

The citation for the District Attorney of those cases was not in vain, because they are helpful in demonstrating the exercise of jurisdiction in complaints seeking a declaratory judgment. *Bunis* and *Bookcase* were First Amendment cases. In *Bookcase,* the Court of Appeals held that the complaint stated a case for the exercise of jurisdiction. The complaint there, alleged as the present one, of plaintiff's prior prosecution and fear of subsequent sale of a certain book unless the court declared his right to sell same free from fears of prosecution

under the statute which the plaintiff claimed was repugnant to the Constitution. After the conviction of The Bookcase, Inc., there had been no threats or intimidation. It was only the plaintiff's fears after his prosecution, of the consequences of a subsequent sale that produced the cause of action.

It must be remembered that the New York courts have had substantial experience with declaratory judgments in relation to First Amendment claims. *Bunis* is one of them. The following language is as apt as it is helpful:

Page 210:

> "If relief by way of a declaratory judgment were not available, the chief of police, the district attorney or other local law enforcement authorities could impose an informal censorship merely by announcing that anyone selling a particular book would be prosecuted. Booksellers are naturally reluctant to incur the risk of criminal prosecution since that entails adverse publicity and physical and mental strain as well as expense, even though the prosecution should ultimately terminate in the dismissal of the charge. They may therefore refrain from selling the book denounced by the authorities and, in that event, no occasion for criminal prosecution ever arises. The mere threat of prosecution may thus have the effect of deterring or suppressing the sale of the book without any judicial determination ever being made as to whether the book is actually obscene. Such a system of informal censorship has been repeatedly condemned as a prior restraint by the action of governmental officials, in violation of the First and Fourteenth Amendments. * * *"

Page 211:

> "The use of declaratory judgment procedure is the most effective method of overcoming any attempt by local government officials to impose ex-

tralegal censorship. A bookseller, faced with a threat of prosecution if he sells a book condemned by the authorities, may escape from the dilemma by procuring, in an action for a declaratory judgment, a judicial determination as to the legality of the sale of the book, without first selling the book and incurring the risk of prosecution (see *DeVeau v. Braisted, supra,* 5 A. D. 2d 603, 607, 174 N. Y. S. 2d 596, 600, affd. 5 N. Y. 2d 236, 183 N. Y. S. 2d 793, 157 N. E. 2d 165, affd. 363 U. S. 144, 80 S. Ct. 1146, 4 L. Ed. 2d 1109)."

The threat in the *Bookcase* and *Bunis* cases is the threat that exists in this case—that the very existence of the statute restrains the exercise of First Amendment rights. There is no need for a prosecutor to verbalize. *Evers* is of like import. The District Court was of like opinion (A. 33).

What has happened since the District Court held in its first opinion that a case and controversy exists, that requires renewed argument on that score? Nothing. Other than the election of 1966 has passed and that Mr. Multer is no longer a Congressman, no new events have appeared.

(a) As to the passing of the date of the 1966 election: The complaint alleges that the plaintiff is not seeking to enforce his First Amendment right to be free from fear or the chill to distribute the pamphlet only with respect to the election of 1966, but in "subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign.* Such distribution is intended to be made in quantities of more than a thousand copies of such anonymous leaflet" (Complaint, paragraph "Fourteenth"). It

*The complaint does not limit itself to this pamphlet but also, "similar anonymous leaflet."

cannot be expected that Zwickler should be put to commencing a new case just before each expected distribution. The likelihood is that the delays inherent in litigation would delay his exercise until after the occasion for distribution had passed. This inherent delay emphasizes that relief be afforded in this case.

Since as it is Zwickler's contention—a contention that the District Court upheld—that the chill upon plaintiff's right to make distribution authorizes the right of action—Zwickler should be afforded relief. Zwickler was prevented from making distribution during the 1966 election.

Zwickler was also prevented from distributing the leaflet at the election in 1968 by a reason of stay granted by Justice Harlan over opposition by Zwickler's counsel. If there is any one factor that points up the continued vitality of this litigation it is what was said and done in connection with the appellant's application dated June 27, 1968, for a stay. The appellant stated that it was urgent that the stay be granted in order to prevent anonymous literature from being distributed at the 1968 election. The appellee opposed the application because Zwickler would be prevented from exercising his First Amendment rights at the 1968 election. Justice Harlan by order dated July 8, 1968, nevertheless granted the application with a memorandum that the issue is substantial and there was absence of a showing that Zwickler intended to distribute the handbills (to the latter, the answer is that Zwickler's uncontroverted complaint alleged that he intended to continue making distribution of the handbill but has been discouraged by the fear of prosecution). The feature of the application that is conspicuous, is that a stay of this court against Zwickler's distribution had to be invoked to stop Zwickler. Could there be any doubt that the issue is vital?

Moreover, election of party officials, nominations for public office and party position regularly ensue. As we stated, Zwickler cannot wait until such events are announced and then be required to start an action, which will prove abortive for the purposes, because the event will have passed by the time a considered judicial determination is reached. This is all the more emphatic in this case, because the issue at stake would most probably find its way to this court for ultimate decision.

A recent case is dispositive of the issue of mootness. This court in *Carroll v. President and Commissioners of Princess Anne,* October Term, 1968, No. 6, decided November 19, 1968; U. S. ; 37 Law Week 4041, held in a case almost identical to this one on this issue, "that the continuing vitality of the petitioner's grievance, we cannot say that their case is moot." In that case the Commissioners obtained an *ex parte* injunction on August 7, 1966, against the holding of a meeting by proposed speakers. The injunction was to last for ten days thereafter. Almost two (2) years later after the injunction lapsed and the occasion for the meeting had gone, this court granted review, holding that the cause was not moot and is still a case and controversy, citing *Bus Employees v. Missouri,* 374 U. S. 74, 78, and *Walker v. Birmingham,* 388 U. S. 307 (1967).

In cases in New York courts where time had elapsed for the proposed exercise of First Amendment rights because of the attrition of litigation the courts have held that such passage of time does not render the question moot. In the latest case, *East Meadow Association v. Board of Education,* 18 N. Y. 2d 129, 135, the Court of Appeals of New York held that where a controversy is likely to be renewed between the parties, the issue does not become moot. In *Rockwell v. Morris,* 12 A. D. 2d 272, affd. 10 N. Y. 2d 721, cert. denied 363 U. S. 913, the time for which a permit to speak had passed; the court, nevertheless, granted relief for another date. See

also, *Matter of Febish v. New York State Lottery Control*, 32 Misc. 2d 561; *Matter of Rosenbluth v. Finkelstein*, 300 N. Y. 402.

(b) The fact that Mr. Multer is not a Congressman at present is of no consequence, in the light of this case. The pamphlet is a political tract. It is not a "Don't vote for Multer" leaflet. It does not depend upon the candidacy of the person mentioned in the pamphlet. It is a general campaign document. The plaintiff intends to distribute it *as a political tract* because of its significance to the political life of our time and to point out the incidents involved. Zwickler, according to the complaint intends to distribute similar anonymous tracts. The appellee urges the pamphlet does not necessarily have to be against Multer to render it as campaign material, but, as the complaint abundantly alleges (paragraph "Fourteenth"), that it will be used by Zwickler in any election campaign or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to 1966. Since the events did occur in 1966, 1967 and 1968—and will reoccur—the exercise by plaintiff of his constitutional rights is being hampered now. This is a realistic view. An other view would be sheer pedantry. It cannot be expected that Zwickler should have to wait until the eve of one of the events to rush into court and claim that his right is being impaired. What with the delays of litigation, that right will not be determined. We have gone through that experience in this very case (A. 34-36). Since Zwickler feels that his right is chilled *now* his right to a remedy is now. The recent *Carroll* case, *supra*, supports this view.

In this respect, it is not amiss to point out that the author of the leaflet had an insight that subsequent events demonstrated to be correct, as the Israeli-Egyptian war in 1967 disclosed and the Soviet participation in that war on the side of Egypt.

Moreover, the complaint alleges (paragraph "Fifteenth") that Mr. Multer "has been a political figure * * * for many years last past" means that he could be a candidate for Congress again. It also means that the leaflet can be used in connection with any election of party officials or nomination for public office to demonstrate not only the record of the individual named, but also to show what the party permitted to be done and what the party's record is.

It is submitted that the plaintiff has shown that there is a controversy of sufficient substance to warrant the granting of relief by way of declaratory judgment, *Maryland Cas. Co. v. Pacific Coal and Oil Co.*, 312 U. S. 270. The hypothetical situation in *United Public Workers of America*, 330 U. S. 75, 89, does not exist here.

Zwickler has been chilled in the exercise of his First Amendment rights. He was prevented out of fear from exercising them in the 1966 election. The failure to grant him relief, will in effect prevent him from making distribution, for his complaint alleges that he does not intend to make a martyr of himself by risking the prosecution he previously was subjected to.

Nor should Zwickler be remitted to pursue a course of civil disobedience in order to test the validity of the law. Declaratory judgment is an ideal answer to those who assert that civil disobedience is the only method to obtain the ear of a court. To the public, which is sick and tired of pronouncements and stimulations of civil disobedience, especially of violence, the remedy of declaratory judgment should prove effective in reducing what has become a menace to public safety. The result however may diminish the ranks of those who seek martyrdom. But those so emotionally charged may find consolation in other avenues of glory. Zwickler's case shows the way to "an alternative to violence."

POINT III.

The appellant has not shown any abuse of discretion by the District Court in granting incidental injunctive relief.

Injunctive relief is granted or withheld in the exercise of the discretion of the court. Moore's Federal Practice, Rule 65.18(3); 57.10; 65.18(2). The appellant has not shown wherein the District Court abused its discretion.

On the contrary, the judgment is based on sound discretion. A declaratory judgment states the rights of the parties. It does not give the same or as efficient protection that an injunction does. Since Zwickler's emphatic claim has been that he fears to exercise his First Amendment rights because of a potential prosecution, security to him can come only with a judgment that will actually prevent and render void *ab initio,* any such prosecution.

CONCLUSION.

The judgment should be affirmed.

Dated, December, 1968.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 370

ELLIOTT GOLDEN, as Acting District Attorney of the County of Kings,

Appellant,

vs.

SANFORD ZWICKLER,

Appellee.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

JOSEPH B. ROBISON
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Of Counsel

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Interest of the *Amicus*

The American Jewish Congress, a national organization founded in 1918, is a voluntary association of American Jews committed by its constitution to the dual and, for us, inseparable purposes of defending and extending democracy and preserving our Jewish heritage and its

values. We are convinced that the surest way to preserve our nation and our democracy is to guard jealously the liberties secured by our constitution and Bill of Rights and to oppose any infringements upon those liberties not clearly necessitated by overriding interests.

Freedom of speech and freedom of the press are liberties that are basic to the maintenance and development of our democratic way of life. Punishment for the distribution of anonymous leaflets, which thereby inhibits the expression of ideas, is an encroachment on these essential freedoms. Believing that the statute involved in this case constitutes an infringement upon American liberties that cannot be justified as clearly necessitated by an overriding interest, we submit this brief *amicus curiae* with the consent of the parties.

Statement of the Case

This case arises from the judgment and order of a three-judge court of the United States District Court for the Eastern District of New York, entered on June 18, 1968, declaring §457 of the New York State Election Law to be unconstitutional and enjoining enforcement by the appellant. The statute prohibits the printing or distribution in quantity of anonymous political literature in connection with an election.

Appellant was convicted in 1965 of violating New York Penal Law §781-b (now Election Law §457) by distributing handbills mildly critical of a speech delivered on the floor of the House of Representatives by a United States Con-

gressman standing for reelection at the time of the distribution, 1964. His conviction was reversed on April 23, 1965 by the Appellate Term of the New York Supreme Court on state grounds without reaching the constitutional question. On December 1, 1965 the New York Court of Appeals affirmed without opinion.

On April 22, 1966, appellee invoked the Federal District Court's jurisdiction under the Civil Rights Act, 28 U.S.C. §1343, and the Declaratory Judgment Act, 28 U.S.C. §2201, seeking a declaration that §781-b is unconstitutional and an injunction against its enforcement. Appellee's motion for a three-judge court was granted on May 20, 1966 but his complaint was dismissed by that court on September 29, 1966 on the ground that, under the abstention doctrine, the matter should first be considered by the state courts. *Zwickler* v. *Koota,* 261 F. Supp. 985. This Court, on December 5, 1967, reversed and remanded the case to the District Court. *Zwickler* v. *Koota,* 389 U. S. 241.

On May 6, 1968, the District Court rendered its decision, declaring the New York statute invalid and decreeing injunctive relief to implement the declaration of invalidity (A. 29-57).

Statute Involved

New York Election Law, Sections 457 and 458, read as follows:

§457. Printing or other reproduction of certain political literature

No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published,

reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term "printer" as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal.

§458. Penalty

Any person convicted of a misdemeanor under this article shall for a first offense be punished by imprisonment for not more than one year, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or by both such fine and imprisonment. Any person convicted of a misdemeanor under this article for a second or subsequent offense shall be guilty of a felony.

The Question Presented

The question to which this brief is addressed is whether a statute making punishable the printing or distribution in quantity of anonymous political literature in connection with an election abridges freedom of speech and press as protected by the First and Fourteenth Amendments.

Summary of Argument

I. The statute challenged here places a restraint on freedom of the press, a right protected by the First Amendment. Consequently, it must be tested against the preferred position given to freedom of expression under the constitution. The supporting interest of the state must be compelling.

II. A prohibition of anonymity effectively restrains freedom of expression. Anonymity has an accepted and proper place in a democratic society. History as well as current practices establish the inhibiting effect on the free expression of ideas of a requirement that the speaker reveal his name.

The protections of the constitution are particularly essential to the expression of unpopular opinion. But even in the absence of evidence that any particular expression is so unpopular as to subject the speaker or publisher to reprisals, the requirement of exposure must be regarded as having a strong tendency to discourage the appearance of new ideas.

III. No compelling interest of the state justifies the restraints imposed by the statute. The denial of anonymity is not a proper end in itself. The statute is not narrowly drawn for the purpose of inhibiting defamation or preventing the disruption of the election process.

ARGUMENT

POINT I

The statute challenged here must be tested against the preferred position given to freedom of speech under the Constitution.

The statute here challenged plainly places a restraint on the exercise of a right protected by the First Amendment, as made applicable to the states by the Fourteenth. It is an express limitation on the distribution of political literature dealing with candidates or propositions in an election. Thus it curbs an activity lying at the core of the political process. As this Court said in *Mills* v. *Alabama*, 384 U. S. 214, 218-9 (1966):

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that

> Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated, and all such matters relating to political processes.

Distribution of "hand-bills" or leaflets is a classic mode of exercising freedom of speech and this Court has given full protection to these "historic weapons in the defense of liberty * * *" *Lovell* v. *Griffin,* 303 U. S. 444, 452 (1938); *Schneider* v. *Irvington,* 308 U. S. 147 (1939); *Jamison* v. *Texas,* 318 U. S. 413 (1943). The restraint imposed by the statute is avoided if the person exercising his constitutional right by printing or distributing such political literature places his name and address on what he distributes and the name and address of the person at whose instance he acts. If he does not do so, he is entirely barred from using this method of airing his views. The question, therefore, is whether this restraint on a form of expression is consistent with constitutional requirements.

We are dealing here with limitations on the *manner* of expression, as distinguished from limitations on the *content* of what may be said. Where such limitations are designed to achieve a proper governmental purpose, such as the health, comfort or privacy of the public or their protection against fraud and other misconduct, the courts must determine whether the restraint is so essential to achievement of a proper purpose that the curtailment of a constitutional right is justified. See, e.g., *Schneider* v. *Irvington, supra; Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Martin* v. *Struthers,* 319 U. S. 141 (1943); *Prince* v. *Massachusetts,*

321 U. S. 158 (1944); *Kovacs* v. *Cooper*, 336 U. S. 77 (1949); *Breard* v. *Alexandria*, 341 U. S. 622 (1951).

Where, as here, an attempt is made to limit freedom of expression, the "usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). The right asserted by the appellee is among "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society [and which therefore] come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Justice Frankfurter, concurring in *Kovacs* v. *Cooper*, *supra*, at 95. Freedom of the press lies "at the foundation of free government by free men. * * * In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider* v. *Irvington*, *supra*, 308 U. S. at 161.

As this Court has said of the related First Amendment freedom of association, curtailments must be "subject to the closest scrutiny" and the "subordinating interest of the State must be compelling." *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, 461 (1958).

POINT II

The prohibition of anonymity contained in the New York statute places a substantial restraint on freedom of expression.

Freedom to speak and write without restraint on political matters is or may be inhibited by a law that bars all anonymous expression in the form of leaflets. This contention is amply supported by the history of political writing in this country.

A. The Place of Anonymity in a Democratic Society

To begin with, it should be recognized that there is nothing inherently wrong in desiring to keep one's name from the public. Anonymity may serve important social objectives. The cause of civilized progress was greatly benefited by the fact that Daniel Defoe could publish anonymously his *Shortest Way with the Dissenters,* and it was correspondingly greatly harmed when Defoe's identity was discovered and he was fined and pilloried for his offense (Minto, *Daniel Defoe* (1909), pp. 38-40).

In this country, even before the founding of our Republic, the practice of speaking anonymously on social and political matters was accepted as normal and proper. Benjamin Franklin signed his first pieces for the *New England Courant* as "Silence Dogwood". (Bleyer, *Main Currents in the History of American Journalism* (1927), pp. 56-57). The use of names like "Philanthrop," "Humanus" and "Cato" as signatures on articles on public affairs was widespread (*Id.,* pp. 43-100). In 1775, Thomas Paine used

the signature "Humanus" in an article for the *Pennsylvania Journal*; after Rev. William Smith, president of the University of Philadelphia, used the name "Cato" in attacking Paine's *Common Sense,* Paine replied under the name of "Forester" (*Id.*, p. 91). The *New Hampshire and Vermont Journal or Farmers Weekly Museum* regularly published articles in the 1790's written by such persons as "The Lay Preacher," "Peter Pencil," "Simon Spunkey," "Peter Pendulum" and "The Pedlar" (*Id.*, p. 128).

The most famous of all American political writings, *The Federalist,* written by Alexander Hamilton, James Madison and John Jay, was published anonymously. Indeed, the attribution of several of the essays is still in doubt. As Professor Earle points out (*The Federalist,* Modern Library Edition (1937), Introduction, p. ix), during the controversy over the endorsement of the Constitution, "The press of the day was submerged with contributions from anonymous citizens." Among those anonymously opposing ratification was New York's Governor George Clinton, who wrote under the name of "Cato" (see the introduction by Paul Leicester Ford to the Henry Holt edition of *The Federalist* (1898), pp. xx-xxi).

Thus, in the early days of our Republic, persons who were or were to become President of the United States, Chief Justice of the Supreme Court, Secretary of the Treasury and Governor of New York did not hesitate to maintain their anonymity in publishing weighty public and political documents.[1]

1. See also Westin, Alan F., *Privacy and Freedom* (1967), p. 331. Professor Westin notes that the First Amendment broke with "the principle of seventeenth-century English licensing laws, which had required books and pamphlets to bear the name of the author and printer."

This practice is still used by public officials. *Foreign Affairs,* the United States' most influential periodical dealing with international policy, has frequently in recent years masked the names of its contributors, carrying leading articles signed simply by single initials, including the famous "X" article, "The Sources of Soviet Conduct," which set forth the Government's policy towards the Soviet Union (Foreign Affairs, Vol. 25, Nos. 1 & 4, Vol. 27, No. 2, Vol. 36, No. 1).

As this Court concluded in *Talley* v. *California,* 362 U. S. 60, 65 (1960):

> It is plain that anonymity has sometimes been assumed for the most constructive purposes.

B. Anonymity as an Aid to Free Expression

Appellant suggests that anonymity is necessary, or desirable, only "in an atmosphere of repression" (Brief, p. 29). However, the debate on the Constitution, to which the anonymous papers in *The Federalist* contributed, was not conducted in such an atmosphere. Moreover, there is ample evidence that denial of anonymity has an inhibiting effect even in today's open society.

Public opinion researchers accept the fact that some persons will hesitate to express themselves freely and honestly if they think that there is a chance that their names will ultimately be associated with the answers they give. In *Interviewing for NORC* (1945), the National Opinion Research Center, which has conducted surveys for many government agencies, advised its employees (p. 15):

> A few persons may be reluctant to talk if they feel their names will be taken. You can explain that NORC *never* wants the name of anyone who doesn't want us to have it.

That the loss of anonymity can have a serious effect on free exercise of opinion is recognized in the book, *How to Conduct Consumer and Opinion Research,* Blankenship, ed. (1946). The essay on "Measurement of Employees' Attitude and Morale" advises employers to place (pp. 223-4)

> * * * emphasis on the point that the questionnaires must not be signed, that no one in the company will have access to the answered questionnaires, that there is no means of identifying a particular person's blank. All of the mechanics of distributing the questionnaire forms and the placing of the answered forms in the ballot box are such as to guarantee anonymity to the employee.

In the same book, the essay on "Trends in Public Opinion Research" describes conclusions drawn by the Office of Public Opinion Research from a comparison of questionnaires answered secretly with others answered by persons who were told that their identity would be known (p. 298):

> Experiments with secret ballots as compared with oral interviews have shown that respondents are not always frank in stating their opinions. An unpopular opinion or one that reflects in any way upon the prestige of the respondent often gets a higher rating in the secret ballot than in oral replies.[2]

2. The original experiments are reported in detail in Cantril, *Gauging Public Opinion* (1944), Chap. V.

In employees' suggestion programs, likewise, it is common practice to set up a system in which the person making the suggestion does not identify himself but receives a numbered receipt from which he may be identified after the suggestion has been considered. In *How To Conduct A Successful Employees' Suggestion System* (p. 9), Ezra S. Taylor rates anonymity as the most important condition for successful suggestion systems.

There are other ways in which modern society recognizes anonymity as a valuable aid in assuring free expression of opinion. It is standard practice for newspapers to print letters signed with initials or fictitious names. While the editors require that the writer disclose his name to them, they recognize that a freer expression of opinion can be achieved if they do not require public exposure of the writer's identity.

Underlying all these practices, anonymous polls, letters to the editors and the like, is the well-founded belief that anonymity in the expression of views contributes to the free play of ideas and hence to the ultimate search for truth, the same search for truth that the founding fathers sought to foster by the guarantees of the First Amendment. As Professor Westin put it:[3]

> Just as a social balance favoring disclosure and surveillance over privacy is a functional necessity for totalitarian systems, so a balance that ensures strong citadels of individual and group privacy and limits both disclosure and surveillance is a prerequisite of liberal democratic societies. The democratic society relies on publicity as a control on government, and on privacy as a shield for group and individual life.

3. *Op. cit. supra,* p. 24.

C. Political Privacy

The value of anonymity, as a guarantee of freedom, is recognized most clearly in the rules governing the act that symbolizes our democracy—the election of public officers. It is not too much to say that the degree of freedom that prevails in a country's election is the surest test of the liberty of its citizens. As Justice Frankfurter pointed out, concurring in *Sweezy* v. *New Hampshire,* 354 U. S. 234, 266 (1957):

> In the political realm as in the academic, thought and action are presumptively immune from inquisition by political authority. It cannot require argument that inquiry would be barred to ascertain whether a citizen had voted for one or the other of the two major parties either in a state or national election. Until recently, no difference would have been entertained in regard to inquiries about a voter's affiliations with one of the various so-called third parties that have had their day, or longer, in our political history.

This right of "political privacy" (*id.* at 267) deserves protection whether exercised through major parties, through minor parties as in *Sweezy* or in *DeGregory* v. *Attorney General of New Hampshire,* 383 U. S. 825, 828-9 (1966), through organizations as in *NAACP* v. *Alabama,* 357 U. S. 449 (1958), or as in the present case, by an individual voicing criticism of a candidate for public office.

D. Protection of Unpopular Opinion

The mantle of protection that the Constitution throws over the right to hold and espouse political, religious and other views is designed primarily for those who adhere to unpopular causes, those who advance the "opinions we

loath" (Justice Holmes, dissenting in *Abrams* v. *United States,* 250 U. S. 616, 630 (1919)). Hence, when basic guarantees of the First Amendment are asserted, they must be interpreted in a manner that insures protection to the advocate of unpopular causes—the advocate who stands to be injured most by enforced disclosure of his identity.

This, we believe, is the principal thrust of this Court's decision in *NAACP* v. *Alabama, supra.* This Court was there concerned with the protection of those who hold "dissident beliefs" (357 U. S. at 462). Although the case involved exposure of organized activity, the reasoning applied equally to individual expression. Indeed, this Court expressly noted that, in asserting the right of anonymity, the Association "argues more appropriately the rights of its members" (*Id.* at 458).

The *NAACP* case established the importance of giving the full protection of the First Amendment guarantees to organized groups which may face hostility from the rest of the community. It is even more important, we believe, to protect the individual speaker against the inhibiting effect of exposure. It is with the single advocate of an idea that all movements begin. And it is while the idea is held only by one or a few persons that anonymity may make the difference between survival or immediate extinction.

In *Talley* v. *California,* 362 U. S. 60, 64 (1960), this Court concluded that there "can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." We submit that the statute here challenged has, as

well, an unquestionably inhibiting effect on freedom of expression.

Appellant urges that there was no need for anonymity in the circumstances out of which this case grew—that any fear of reprisal on the part of appellee would have been "fanciful" (Brief, p. 30). However, that is not for appellant, representing the state, to say. Whether one requires the cloak of anonymity to loosen expression is a subjective judgment that only the individual can make. If the state were allowed to take over that role, the whole purpose of protecting anonymity when it is needed (and appellant concedes it is sometimes needed (Brief, p. 31)) would be thwarted.

Thus, it is irrelevant whether the views distributed by Zwickler would have been well received by the group to which they were addressed on even whether, objectively viewed, anonymity was necessary. The Bill of Rights is designed to prevent the feeble spark of the untried idea from being quenched by a flood of hostile majority opinion. The speaker should not be required to judge, each time, whether such a flood will occur or whether a court may so decide. As the court below observed, where First Amendment freedoms are involved, the threat of a "penal restraint on utterances blights those freedoms by its very presence" (A. 32).

It is on this point, we submit, that the District Court went astray in *United States* v. *Scott,* 195 F. Supp. 440 (D.C., N.Dak., N.D., 1961), relied on by Appellant (Brief, p. 15). The court there upheld the Federal anti-anonymity law, 18 U.S.C. Sec. 612, which prohibits publication of

anonymous statements about candidates for Federal office. In upholding the statute, the court relied on its conclusion that the defendant's claim that he might be subject to reprisals was highly speculative. It said (at 443): "the mere possibility of reprisal is not enough."

It does not appear, however, that this Court rested its decision in the *NAACP* or *Talley* cases on evidence of threats of reprisals or pressure. Thus, the *NAACP* case stands for the broad principle that "compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . a restraint on freedom of association . . ." (357 U. S. at 462). In the *Talley* case, there is no evidence of any kind of the likelihood of reprisal. It was held to be enough that the identification requirement would tend to restrict freedom of expression. Similarly, in *Gibson* v. *Florida Legislative Investigating Com.*, 372 U. S. 539 (1963), this Court protected the anonymity of the members of an association without any showing of the possibility of reprisal.

POINT III

The interest of the State in the proscription of anonymity does not justify the deterrent effect upon freedom of expression and the interference with political privacy imposed by the New York statute.

Although there are reasons why disclosure of the sources of political literature may be desired in the context of an election campaign, it is necessary to weigh the interests of the State to ascertain whether such interests justify the deterrent effect upon freedom of expression. *Schneider* v. *State of New Jersey, supra.*

A. Denial of anonymity is not a proper end in itself. In *Watkins* v. *United States,* 354 U. S. 178, 187 (1957), this Court said: "There is no general authority to expose the private affairs of individuals without justification in terms of the function of Congress." This concept was reiterated in *Barenblatt* v. *United States,* 360 U. S. 109, 127 (1959), where this Court said: ". . . Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to such a [valid legislative] purpose." We submit that it is equally true that state and local governments have no power to compel exposure without justification in terms of their own function. Exposure does not justify itself, particularly where its effect restrains freedom of expression.

B. Neither is it appropriate, as Appellant contends (Brief, p. 15), for the State to decide that it must prohibit anonymity in order to enable readers to judge the motives and good faith of the writer. The anonymous writer pays a price for whatever advantage he gains by concealing his name. Most if not all his readers will count his secrecy against him in weighing what they read. On the other hand, it can be argued that anonymity contributes to rational appraisal of arguments since it reduces the element of personal bias. These and other competing factors are part of the free competition of ideas which the State may not constitutionally disturb by tilting the scales.

C. It is sometimes argued that statutes such as the one here involved serve to inhibit defamation by exposing the writer to legal action he might otherwise escape. This jus-

tification must be tested against the principle that legislation limiting expression must be "narrowly drawn to cover the precise situation giving rise to the danger." *Thornhill* v. *Alabama,* 310 U. S. 88, 105 (1940). See also *Aptheker* v. *Secretary of State,* 378 U. S. 500, 508 (1964), and cases there cited. We submit that the statute fails to meet that test. It is overbroad because it prohibits *all* anonymous political literature. It covers leaflets discussing abstract issues as well as those containing personal references.[4] The possibility that some leaflet or handbill may contain libelous matter does not justify the sweeping proscription of all anonymous literature.

It is also argued that, in the context of an election, it is sometimes difficult to identify a source before a choice must be made (Appellant's Brief, pp. 20-21). The New York statute, however, is not restricted to the dissemination of materials immediately prior to an election but applies broadly to any point in time in connection with any election.

Apposite to both these arguments is Justice Harlan's comment, in his concurring opinion in the *Talley* case, *supra,* that, although the restrictive ordinance was aimed at the prevention of fraud, deceit, false advertising, obscenity, libel, etc., ". . . the ordinance is not so limited, and I think it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in

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4. Compare the Federal statute, 18 U.S.C., Sec. 612, upheld in *United States* v. *Scott, supra.* That statute is limited to statements about individuals.

order to identify the distributors of those that may be of an obnoxious character" (362 U. S. at 66).[5]

D. Finally, the appellant has not even borne the burden of showing that anonymous publications are so significant a factor in elections as to require this restraint on expression. The history recited in its brief (pp. 21-25) hardly rises to the level of showing a pressing need for restrictions. At most, anonymous literature appears as a minor irritation, creating a desire on the part of many to put an end to it. But more than mere irritation or desire on the part of persons in office is needed to justify this measure. It has not been shown, as it must be, that the free exchange of ideas, the election process or any other proper interest of the state has actually been jeopardized.

We submit, therefore, that New York has shown no more than "mere legislative preferences or beliefs respecting matters of public convenience" which this Court held in the *Schneider* case, *supra*, to be an insufficient response to a claim of constitutional deprivation of freedom of expression.

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5. A number of the decisions upholding state anti-anonymity laws may be distinguished on the ground that the statute involved was more narrowly drawn than that of New York. Thus, the California statute, dealt with in *Canon* v. *Justice Court*, 393 P. 2d 428 (1964), is limited to statements "designed to injure or defeat" a candidate "by reflecting upon his personal character or political action. . . ." In the *Canon* case, this statute was interpreted to apply only to personal attacks on candidates, not impersonal criticism of their views about issues or criticism of their official conduct, such as is involved here. (It should be noted that the statute was invalidated on other grounds.)

Conclusion

The statute here challenged places a restraint on the exercise of the right to freedom of expression, guaranteed against governmental interference by the First and Fourteenth Amendments to the United States Constitution. The restraint imposed is substantial. The State has failed to show sufficient countervailing interests to justify its imposition.

We therefore urge this Court to uphold the decision below that the New York statute is invalid.

Respectfully submitted,

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Of Counsel

January, 1969

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anonymous handbills which the complaint identified as to be distributed in the 1966 and subsequent elections were the 1964 handbill and "similar anonymous leaflets." On the record therefore the only supportable conclusion was that Zwickler's sole concern was literature relating to the congressman and his record.[5] Since the New York statute's prohibition of anonymous handbills applies only to handbills directly pertaining to election campaigns, and the prospect was neither real nor immediate of a campaign involving the congressman, it was wholly conjectural that another occasion might arise when Zwickler might be prosecuted for distributing the handbills referred to in the complaint. His assertion in his brief that the former congressman "can be a candidate for Congress again" is hardly a substitute for evidence that this is a prospect of "immediacy and reality." Thus the record is in sharp contrast to that in *Evers v. Dwyer*, 358 U. S. 202 (1958), relied upon by the District Court.

It was not enough to say, as did the District Court, that nevertheless Zwickler has a "further and far broader right to a general adjudication of unconstitutionality . . . [in] his own interest as well as that of others who would with like anonymity practice free speech in a political environment . . . ." The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance. In *United Public Workers of America* v. *Mitchell, supra,* at 89–90, we said:

> "The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress

[5] The allegation of the complaint that Zwickler might distribute anonymous handbills relating to "party officials" does not indicate otherwise. The Congressman held an elective party position as a district leader. See 290 F. Supp., at 248.

arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough."

The same is true of the power to pass upon the constitutionality of state statutes. No federal court, whether this Court or a District Court, has "jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies.*" *Liverpool, N. Y. and Phil. S. S. Co.* v. *Commissioners*, 113 U. S. 33, 39 (1885). (Emphasis added.) See also *United States* v. *Raines*, 362 U. S. 17, 21 (1960). The express limitation of the Declaratory Judgment Act to cases "of actual controversy" is explicit recognition of this principle.

We conclude that Zwickler did not establish the existence at the time of the hearing on the remand of the elements governing the issuance of a declaratory judgment, and therefore that the District Court should have dismissed his complaint. We accordingly intimate no view upon the correctness of the District Court's holding as to the constitutionality of the New York statute. The judgment of the District Court is reversed, and the case is remanded with direction to enter a new judgment dismissing the complaint.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 370.—October Term, 1968.

Elliott Golden, as District Attorney of the County of Kings, Appellant,
v.
Sanford Zwickler.

On Appeal From the United States District Court for the Eastern District of New York.

[March 4, 1969]

Mr. Justice Brennan delivered the opinion of the Court.

This case was here before as *Zwickler* v. *Koota*, 389 U. S. 241 (1967). We there held that the three-judge District Court for the Eastern District of New York erred in abstaining from deciding whether Zwickler, appellee in the instant case, was entitled to a declaratory judgment respecting the constitutionality of New York Penal Law § 781–b, now New York Election Law § 457, and we remanded to the District Court for a determination of that question. Section 781–b made it a crime to distribute anonymous literature in connection with an election campaign.[1] Zwickler had been convicted of violating this provision by distributing anonymous handbills in connection with the 1964 congressional election. That conviction was reversed, on state law grounds, by the New York Supreme Court, Appellate Term. The New York Court of Appeals affirmed in 1965 and filed a memorandum which stated that constitutional questions had not been reached. 16 N. Y. 2d 1069, 266 N. Y. S. 2d 140, 213 N. E. 2d 467.

[1] Section 781–b, in pertinent part, made it a misdemeanor to "distribute in quantity . . . : any handbill . . . which contains any statement . . . concerning any political party, candidate . . . in connection with any election of public officers, party officials . . . without . . . reproducing thereon . . . the name and post office address of the . . . person . . . at whose instance . . . such handbill . . . is so . . . distributed . . . ."

A few months thereafter, on April 22, 1966, Zwickler brought this suit.

The complaint sets forth the facts regarding the prosecution and its termination. A congressman standing for re-election in 1964 was criticized in the anonymous handbill for opposing two amendments to the 1964 Foreign Aid bill.[2] The complaint alleged that the

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[2] The text of the 1964 handbill is as follows:

"REPRESENTATIVE MULTER—EXPLAIN YOUR POSITIONS

"AID TO NASSER

"On September 2, 1964, an amendment was proposed to a foreign aid bill (Public Law 480). In substance, it would have cut off all aid to the United Arab Republic. Congressman Multer spoke at length against the amendment, and in his own words, urged its defeat 'as earnestly as I can.' He stated that his position was based on 'humanitarian instinct.' (Congressional Record 20792.)

"In this respect, the following should be noted

"(a) Congressman Multer's stand permits the diversion of funds by Dictator Nasser to his armaments buildup.

"(b) The United Arab Republic is also a recipient of aid from Communist Russia.

"(c) Egypt is now employing the technical skills of scientists, formerly under the employ of the Nazis.

"(d) Congressman Multer debated against the amendment on the eve of the summit conference held in Cairo by 13 Arab States which are threatening the peace of the Near East and the State of Israel in particular.

"SOVIET ANTI-SEMITISM

"The 1964 Foreign Aid bill was passed in the United States Senate with an amendment sponsored by Senator Abraham Ribicoff (D., Conn.) that strongly condemned the anti-Semitic practices of the Soviet Union. When this issue was brought to the House-Senate conferees, a much more general statement decrying all types of religious bigotry was adopted.

"Representative Multer praised this 'watered down' measure on the House floor, and stated:

"'While the Senate version did point the finger directly at Soviet Russia, the version as finally adopted, I think, is much the better one.'

"'I believe, instead of pointing the finger at the culprit now before the bar of world public opinion where it is being so severely con-

congressman "will become a candidate in 1966 for reelection . . . and has been a political figure and public official for many years," and that Zwickler "desires and intends to distribute . . . at the place where he had previously done so and at various places in said [Kings] county, the anonymous leaflet herein described . . . and similar anonymous leaflets . . . at any time during the election campaign of 1966 and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966."

It was disclosed on the argument of *Zwickler* v. *Koota* in this Court that the congressman had left the House of Representatives for a place on the Supreme Court of New York. We deemed this development relevant to the question whether the prerequisites for the issuance of a declaratory judgment were present. We noted, however, that, probably because of the decision to abstain, the parties had not addressed themselves to, and the District Court had not adjudicated, that question. 389 U. S., at 244, n. 3. Therefore, we directed that on the remand "appellant [Zwickler] must establish the elements governing the issuance of a declaratory judgment." *Id.*, at 252, n. 15; see also *id.*, at 252–253, n. 16.

The District Court hearing on the remand was limited largely to the oral argument of counsel, and no testimony was taken concerning the existence of the elements governing the issuance of a declaratory judgment. The three-judge court held that the prerequisites of a declaratory judgment had been established by the facts alleged

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demned, it is much better that this Congress go on record as it is doing now, against religious persecution wherever it may raise its ugly head.' (Congressional Record 22850.)

"WHY MR. MULTER, WHY? ? ? ? ?"

in the complaint, and that the fact that the congressman who was the original target of the handbills would not again stand for re-election did not affect the question. The Court said:

> "The attempt of defendant to moot the controversy and thus to abort a declaration of constitutional invalidity by citing the circumstance that the Congressman concerning whom the Zwickler handbill was published has since become a New York State Supreme Court Justice must fail. When this action was initiated the controversy was genuine, substantial and immediate, even though the date of the election to which the literature was pertinent had already passed.
>
> . . . . . .
>
> "The fortuitous circumstance that the candidate in relation to whose bid for office the anonymous handbill was circulated had, while vindication inched tediously forward, removed himself from the role of target of the 1964 handbill does not moot the plaintiff's further and far broader right to a general adjudication of unconstitutionality his complaint prays for. We see no reason to question Zwickler's assertion that the challenged statute currently impinges upon his freedom of speech by deterring him from again distributing anonymous handbills. His own interest as well as that of others who would with like anonymity practice free speech in a political environment persuade us to the justice of his plea." 290 F. Supp. 244, 248, 249 (1968).

We noted probable jurisdiction. 393 U. S. 818 (1968). We reverse.

The District Court erred in holding that Zwickler was entitled to declaratory relief if the elements essential to that relief existed "[w]hen this action was initiated." The proper inquiry was whether a "controversy" requisite

to relief under the Declaratory Judgment Act existed at the time of the hearing on the remand.[3] We now undertake that inquiry.

"[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field." *United Public Workers of America* v. *Mitchell*, 330 U. S. 75, 89 (1947). "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Oil Co.*, 312 U. S. 270, 273 (1941).

We think that under all the circumstances of the case the fact that it was most unlikely that the congressman would again be a candidate for Congress precluded a finding that there was "sufficient immediacy and reality" here.[4] The allegations of the complaint focus upon the then forthcoming 1966 election when, it was alleged, the congressman would again stand for re-election. The

[3] The Declaratory Judgment Act, 28 U. S. C. § 2201, expressly provides: "*In a case of actual controversy* within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." (Emphasis added.)

[4] The former congressman's term of office as a State Supreme Court Justice is 14 years.